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**The Operation and Regulation of Collective Management Organizations of Music Works in  
the Digital Era:**

**A Review of Kenya's Legislative Framework.**

by

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## **Dedication**

First and foremost, this dissertation is dedicated to musicians, music lovers and all music users. To musicians, for the talent that goes in to piece up the amazing music works and for providing a sense of tranquility while writing legal works such as this dissertation.

Special gratitude goes to my father and mother, my number one cheerleaders. I thank them for the financial support and continuous prayers throughout my work in this dissertation.

I also dedicate this dissertation to my siblings, my many friends in Cape Town and in Kenya. They provided tremendous moral support in the course of writing. I sincerely thank Princess Sophia for the many hours of proof reading.

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Above all I thank the almighty God for favor. Bless the Lord, Oh my Soul!

## **Abstract**

The era of digitization has brought about new categories of copyright works and new modes of dissemination of these works. This has affected music works copyright, collective management of these rights and the law of copyright as a whole. Scholars hold different opinions on the effect of technological advancement on collective management. One tier believes that it expands the role of CMOs by providing the most appropriate and convenient way to exercise these new bundles of rights. The other tier believes that CMOs might become irrelevant since new technologies enable copyright holders to maintain a direct relationship with users. Consequently, this dissertation seeks to prove that digitization is complementary to the role of CMOs. It is complementary if and when the legislative structure is reformed to contain technology specific provisions. In turn this would justify the continued existence of CMOs.

The research will focus on collective management of music works in Kenya. A majority of Kenyans have access to internet making it easier to use and disseminate musical works in the digital environment. This research questions whether this type of usage is subject to collective management and whether the current copyright laws facilitate collective management in the digital environment.

The main hypothesis developed is: effective regulation of copyright offers a better attempt at ensuring efficiency of CMOs in the digital era. Kenya's copyright laws have been amended severally to reflect changes in copyright law. Constant litigation in the area of copyright seeking to interpret the application of current statutory provisions in the digital era, offers a clear indication that the amendments and application of the current copyright laws is not effective given the technological evolution.

African countries like South Africa and Nigeria have started their legislative journey in amending their copyright laws. Kenya needs to appreciate the need to amend the current copyright laws and start its own journey of regulating copyright in the digital era.

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## **Abbreviations**

CMOs:	Collective Management Organizations
KCA:	Kenya Copyright Act
IP:	Intellectual Property
CA of Kenya:	Communication Authority of Kenya
WIPO:	World Intellectual Property Organization
WCT:	WIPO Copyright Treaty
WPPT:	WIPO Performances and Phonograms Treaty
UGCs:	User Generated Content
TPMs:	Technological Protection Measures
ISPs:	Internet Service Providers
IAPs:	Internet Access Providers
DRMs:	Digital Rights Management
CDs:	Compact Discs
SACEM:	French Society of Authors, Composers and Music Publishers
GEMA:	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
PRS:	Performing Rights Society
UK:	United Kingdom
CISAC:	International Confederation of Societies of Authors and Composers
IFRRO:	The International Federation of Reprographic Reproduction Organizations



KECOBO:	Kenya Copyright Board
MCSK:	The Music Copyright Society of Kenya
WTO:	World Trade Organization
TRIPS:	Agreement on Trade Related Aspects of Intellectual Property
KAMP:	Kenya Association of Music Producers
PRiSK:	Performers Rights Society of Kenya
KOPIKEN:	Reproduction Rights Society of Kenya
MPAKE:	Music Publishers Association of Kenya
P2P:	Peer to Peer file sharing
ZAR:	South African Rands
NFP:	Network Facilities Provider
ASP:	Applications Service Provider
CSP:	Contents Services Provider
TV:	Television
ECJ:	European Court of Justice
SAMRO:	Southern African Music Rights Organization
SARRAL:	South African Recording Rights Association Limited
DALRO:	Dramatic Artistic and Literary Rights Organization (PTY) Ltd
SAMPRA:	South African Music Performance Rights Association
CAPASSO:	the Composers Authors and Publishers Association
NORM:	National Organization of Reproduction Rights
POSA:	Performers Organization of South Africa Trust
CRC:	Copyright Review Commission

ECT:	Electronic Communications and Transactions Act
MCSN:	Musical Copyright Society of Nigeria
NCC:	the Nigerian Copyright Commission
PMRS:	Performing and Mechanical Rights Society of Nigeria
COSON:	Copyright Society of Nigeria
NIPCOM:	Nigerian Intellectual Property Commission

## Chapter One

### 1.0. Research Analysis

The main focus of this dissertation is on collective management of music work copyright in Kenya. Use of the term '*music works*' in this dissertation collectively refers to the three distinct copyrightable works in a song. These are lyrics (literary works), musical compositions (musical works) and sound recordings<sup>1</sup>. Copyright law makes a distinction in relation to how the dissertation uses these terms since it does not use a collective term to refer to the works and protects them separately.<sup>2</sup> This dissertation does not focus on music performers since the concept of their exclusive rights differs from exclusive copyrights since they are exclusive to performers. Nevertheless it discusses the rights in sound recordings and audio visual works which music performers are entitled to under copyright.

This dissertation seeks to show that digitization<sup>3</sup> of music works is complementary to the role of Collective Management Organizations (CMOs) in organizing the online copyright market. It discusses digitization in Kenya as a result of the widespread use of internet through mobile phones. Statistic reports by the Communication Authority of Kenya (CA of Kenya) revealed that by December 2016 Kenya had 38.9 million active mobile subscriptions<sup>4</sup> which accounts for 88.2 % of the population.<sup>5</sup> Additionally, the internet World Stats reveals that 69.6% of Kenya's population has access to the internet.<sup>6</sup> This has resultantly catapulted the number of Kenyans with access to music works through use of the World Wide Web.

Kenya is a signatory to the WIPO Copyright Treaty (WCT) since 1996 but is yet to ratify it.<sup>7</sup> This treaty was formed as a response to the challenges of regulating copyright in the digital

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<sup>1</sup> The aural fixation of the sounds of a performance; section 2 of the Kenya Copyright Act (KCA).

<sup>2</sup> Section 2, 26, 28 of KCA.

<sup>3</sup> Digitization is the use of technology and the internet to facilitate communication;  
<https://en.oxforddictionaries.com/definition/digital>.

<sup>4</sup> Out of a population of 47 898 083 people.

<sup>5</sup> CA of Kenya, Second Quarter Sector Statistics Report for The Financial Year 2016/2017 (October-December 2016);

<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q2%20FY%202016-17.pdf> ; <http://countrysmeters.info/en/Kenya>.

<sup>6</sup> September 2015.

<sup>7</sup> [http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct\\_wppt.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf)

environment and is referred to as one of the internet treaties.<sup>8</sup> The absence of some pertinent provisions of the internet treaties in Kenya's copyright legislation and evidence of litigation in copyright will be used as bases to propose the amendment of the Copyright Act<sup>9</sup> so as to facilitate collective management in the digital environment. The ongoing case of *Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors*<sup>10</sup> is used to elucidate the need to amend the current copyright legislation. This researcher discusses some online uses of music work and how they should be regulated in order to enhance collective management in Kenya. The researcher argues that the reason behind haphazard collective management and loss of remuneration for right holders lies in Kenya's analogue legislation that is not at par with the changes brought by digitization of copyright.

The dissertation draws recommendations through a study of comparable foreign law including Canada, South Africa and Nigeria. Canada's copyright legislation is considered to be one of the most progressive amongst commonwealth countries.<sup>11</sup> Canada's approach is used to interpret provisions that are ambiguous in Kenya's legislation and not addressed in South Africa's and Nigeria's approach. South Africa and Nigeria have been chosen since they are African countries and Common Law countries undergoing processes of amending their current copyright laws. Their proposed amendments touch on matters surrounding online uses of music works that affect collective management and are at the heart of this dissertation.

The findings of this dissertation reveal the gaps in the legal and institutional framework governing Kenyan CMOs in their management of music works in the digital environment. These are the regulation of fair dealing exceptions, file sharing, intermediary liability for copyright infringement, transformative works and the scope of exclusive rights. This research on collective management of music works also proposes non legislative ways of aligning CMOs with the changes brought about by digitization for effective management of copyright in the digital environment.

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<sup>8</sup> The other internet treaty is the WIPO Performances and Phonograms Treaty (WPPT).

<sup>9</sup> The Kenya Copyright Act, 2001 is referred to as the KCA in the footnotes and the Copyright Act in the main work.

<sup>10</sup> Petition No. 600 of 2014; <https://ipkenya.wordpress.com/2015/09/08/government-invites-public-views-on-liability-of-online-intermediaries-for-copyright-infringement>.

<sup>11</sup> WIPO, WIPO. "Intellectual Property Handbook: *Policy Law and Use* 2 (2004) ISBN 978-92-805-1291-5; available at [http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf).

### **1.1. Research questions**

1. What are the rationales for CMOs and their role in collective copyright management in the digital era?
2. Does the legal framework in Kenya facilitate collective administration in the digital era?
3. What lessons may the country of Kenya learn from experiences in Canada, South Africa and Nigeria?

### **1.2. Chapter breakdown**

Chapter one provides a research analysis of the dissertation, the research questions and chapter breakdown. Section 1.3 is an introduction to the concept of collective management and the effect of digitization on copyright law and the operation of CMOs. The section also identifies the digital uses of music works that present challenges in management by CMOs. It does so by introducing the areas of research that discuss Kenya's response to these digital challenges: the regulation of fair dealing, file sharing, intermediary liability for copyright infringement, the scope of exclusive rights and transformative works in the digital environment. This will be discussed in detail in chapter three of the dissertation.

Chapter two conceptualizes the rationale for existence of collective management of copyright in the digital era by discussing the theoretical framework for copyright and the digital and economic rationale for collective management. This chapter then traces the origin and historical development of collective management in Kenya in terms of international instruments and domestic legislation; so as to understand the nature of law regulating collective management of copyright law in Kenya and why it should be amended.

Chapter three provides the legislative framework for protecting music works in Kenya. This chapter establishes how copyright law has responded to regulate works when technology changes the status quo. The framework will be used to discuss how Kenya responds to the various digital problems that CMOs face. In doing so this chapter will analyze if and how the laws facilitate collective management of music works in the digital environment. It will then discuss and anticipate how digital uses and management of these digital challenges will expand the mandate of CMOs in Kenya.

Chapter four is a comparison of legislation enabling collective management of copyright in Kenya with that in South Africa and Nigeria. This analysis is aimed at understanding the development and journey of both countries; in changing or revising their legislation to explicitly provide for management of copyright in the digital era.

Chapter five is a conclusion and possible recommendations for Kenya.

### **1.3. An introduction to the concept of collective management and the effect of digitization on copyright law and the operation of CMOs**

There are different models for authorizing use of copyrighted works: individual management, collective management and through limitations on exclusive rights by compulsory licensing<sup>12</sup> and fair dealing exceptions<sup>13</sup>.<sup>14</sup> Individual management of copyright is where a right holder directly controls the exploitation and dissemination of their work.<sup>15</sup> Collective management is the joint exercise of exclusive rights between right holders and CMOs.<sup>16</sup> Right holders authorize CMOs “to monitor use of their works, negotiate with prospective users, give them license against appropriate remuneration on a basis of tariff and appropriate conditions, collect remuneration and distribute it among owners of the right.”<sup>17</sup> This authorization makes CMOs intermediaries between right holders and users of the works.<sup>18</sup> They manage exclusive copyrights by granting licenses to users on a basis of tariff, monitoring copyright users, collecting remuneration from the licenses and distributing the same to the right holders in form of royalties and institute legal actions against infringement of copyrights which they have title to.<sup>19</sup>

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<sup>12</sup> Right holders lose exclusive right to control use of their works for compensation.

<sup>13</sup> Kenya being a fair dealing state the dissertation will focus more on the fair dealing other than compulsory licensing to explain dealings with copyright works that do not attract compensation for use and cannot be subjected to collective management.

<sup>14</sup> Dusollier, Séverine, and Caroline Colin. "Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management." *Colum. JL & Arts* 34 (2010): 809.

<sup>15</sup> Ficsor, Mihály. *Collective management of copyright and related rights*. Vol. 855. WIPO, 2002. Available at : [ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo\\_pub\\_855e.pdf](ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid; Ola, Olukunle Rotimi. *Operation and regulation of copyright collective administration in Nigeria: important lessons for Africa*. Diss. 2012.

<sup>18</sup> Liu, Kung-Chung, and Reto M. Hilty, eds. *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models*. Vol. 27. Springer, 2017.

<sup>19</sup> Mihály op cit (n15) at 4; Andersen et al 2000:21.

Collective management may be voluntary,<sup>20</sup> mandatory,<sup>21</sup> or extended<sup>22</sup>. The choice of countries under research adopt voluntary collective management therefore ruling out the vast discussion of mandatory or extended collective management in this dissertation. Particularly, Kenya makes provision for a voluntary CMO system in article 36(2)<sup>23</sup> of the Constitution.

Collective management is exercised where it is impractical to exercise rights individually.<sup>24</sup> CMOs simplify the process of licensing for users by providing access to work from a single source and simplifying the negotiation process and collection of fees.<sup>25</sup> They may also contract with other CMOs to allow cross border licensing which enables users to get authorization from one single CMO for the use of works protected in other jurisdictions. The procedure required for radio stations to get clearance for use of music works elucidates other factors that make individual management of music work copyright ineffective. For radio stations to play music they need authorization from right holders to copy the music into electronic devices and broadcast the works. Copyright in music works may be shared amongst persons or entities in different jurisdiction making it difficult for radio stations to get authorization from each right holder.<sup>26</sup> If they attempt to do so the process will prove difficult and expensive.<sup>27</sup> Secondly, a radio station plays thousands of songs per week and cannot anticipate which songs will be played enough so as to seek individual licenses.<sup>28</sup> Thirdly, it is impractical for right

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<sup>20</sup> Right holders decide whether to entrust management of their copyright to CMOs or not; Kenya, South Africa, United Kingdom; Séverine, and Colin op cit (n14) at 4.

<sup>21</sup> Laws impose mandatory management of rights by CMOs. Members of the European Union are bound to the Council Directive 93/83, 1993 which requires owners of cable retransmission rights to commit the management of these rights to CMOs.

<sup>22</sup> It is a hybrid of voluntary and mandatory management and applies similarly to voluntary management for members of the CMO but for non members a license between a CMO and a user is extended by a statutory provision to works of rights holders who are not members of the CMO. This is used in Malawi, Germany, Switzerland and Nordic countries such as Norway, Denmark, Finland and Sweden.

<sup>23</sup> Which provides that no person shall be compelled to join any association including CMOs; this provision is supported by the decision in *Mercy Munee Kingoo & another v Safaricom Limited & another* [2016] eKLR which held that section 30A of the Copyright Act was held to be unconstitutional to that effect.

<sup>24</sup> Collective Management does not refer to the management of collective rights held by a group of people; Mihály op cit n(15) at 4; Hilty, Reto. "Individual, Multiple and Collective Ownership-What Impact on Competition?" (2011). (2011). Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1774802](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774802); Gervais, Daniel J. "Collective management of copyright and neighbouring rights in Canada: an international perspective." *Canadian Journal of Law and Technology* 1.2 (2002).

<sup>25</sup> Ibid.

<sup>26</sup> Gervais, Daniel, and Alana Maurushat. "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management." *Canadian Journal of Law and Technology* 2.1 (2003).

<sup>27</sup> Mihály op cit (n15) at 4.

<sup>28</sup> After the death of a musician, radio stations may decide to play their music more than usual; Gervais, Daniel J., ed. *Collective management of copyright and related rights*. Kluwer Law International, 2010.

holders to negotiate licenses and remuneration for use of their works with each radio station.<sup>29</sup> For the above reasons collective management is considered to be the most feasible means of facilitating public dissemination of works when a single piece of work consists of different copyright protected works and is to be used by many users.<sup>30</sup>

The Berne Convention for the protection of literary and artistic works (the Berne Convention)<sup>31</sup> is credited for being the first international instrument to harmonize copyright law at an international level and to create the initial need for collective management by introducing the right of public performance and communication to the public of a performance<sup>32, 33</sup>. Thereafter authors realized that it was impractical to manage some rights on an individual basis. This created the awareness and need for collective management of copyright.

Although the right to public performance in the Berne Convention was the first use to give rise to collective licensing of copyright works, new types of works and means of exploiting and disseminating copyright protected works have made the need for collective management of rights even more prominent.<sup>34</sup> This dissertation discusses derivative and transformative works in the form of User Generated Content (UGC)s as a new type of work. File sharing is also discussed as a new form of disseminating music works online.<sup>35</sup> To this effect the dissertation considers the implications of these changes to the existing legislative framework for copyright in Kenya with particular attention to interpretation of the exclusive copyrights and the exceptions to their application<sup>36</sup> in the digital environment.

Copyright law has developed and is developing by bringing new works into the realm of protection and by creating new uses for existing copyright works.<sup>37</sup> For instance after the invention of the radio the law adapted to regulate this new environment by expanding the

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<sup>29</sup> WIPO Collective Management and Related Rights; Available at <http://www.wipo.int/copyright/en/management/>.

<sup>30</sup> Description fits the nature of music works; Schepens, Paula. *Guide to the Collective Administration of Authors' Rights*. Paris: Unesco, 2000.; Mihály op cit (n15) at 4.

<sup>31</sup> Adopted in 1886.

<sup>32</sup> Article 11 of the Berne convention.

<sup>33</sup> Chege, John Waruingi. *Copyright law and publishing in Kenya*. Kenya Literature Bureau, 1978.

<sup>34</sup> MA, Kevin Garrett. "Copinger and Skone James on Copyright." (1999): 2-15.

<sup>35</sup> Ibid.

<sup>36</sup> Referred to as fair dealing exceptions in this dissertation.

<sup>37</sup> Gervais and Maurushat op cit (n26) at 5; Christie, Andrew. "Reconceptualising Copyright in the Digital Era." *European Intellectual Property Review* 17 (1995): 522-522.



protective realm of the right of public performance.<sup>38</sup> The music composers argued that the right of public performance should be referred to in respect to communication of the performance of the work via media; so as to ensure that right holders could still get remuneration for use of their works.<sup>39</sup> They advanced their position by stating that the right of public live performance no longer applied as music users could access content without attending live performances and broadcasters were making commercial use of their work which was equivalent to use of theatres and concerts for live performances protected works.<sup>40</sup> Consequently, it was logical “to extend the right of public performance to communication of performance of work by radio.”<sup>41</sup>

In mid-20<sup>th</sup> century to its end when satellite and cable were developed as more sophisticated communication technologies they were added to include communication of a performance in copyright legislations.<sup>42</sup> With the advent of computer programs, photography and cinematography, copyright law responded by creating new classes of work. This caused the existing exclusive rights to grow by analogy as the existing rights were applied to these new classes of works since the exclusive rights encompass different uses in relation to all the different works.<sup>43</sup>

The internet has been widely adopted since the 1990s through the World Wide Web.<sup>44</sup> It has changed the dissemination and access to music works by providing an open network access to a digital environment.<sup>45</sup> It also facilitates the distribution of music works as digital goods. The invention of the MP3<sup>46</sup> file format between the years of 1988 to 1992 marked the period when

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<sup>38</sup> Gervais and Maurushat op cit (n26) at 5.

<sup>39</sup> Ibid; Day, Brian R. "Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse." (2009).

<sup>40</sup> Gervais and Maurushat op cit (n26) at 5.

<sup>41</sup> Ibid.

<sup>42</sup> Communication technologies on transmission of sound begun to serve the public on a large scale by the first and second decades of the 20<sup>th</sup> Century; WIPO Intellectual Property Handbook: Policy, Law and Use Chapter 7 - Technological and Legal Developments in Intellectual Property.

<sup>43</sup> Gervais, Daniel. "The changing role of copyright collectives." *Collective management of copyright and related rights* (2006): 3-36.

<sup>44</sup> Ibid.

<sup>45</sup> “The Internet is a global system of connected networks that operate together using common protocols established through an open standard-setting process. The Internet is founded on an open, non-proprietary protocol known as Transport Control Protocol/Internet Protocol (TCP/IP), and uses a standard coding system, hypertext mark-up language (HTML), for representing data in graphical form on the World Wide Web.” WIPO op cit (n42) at 7.

<sup>46</sup> MPEG Audio Layer-3 or "MP3."<sup>2</sup> refers to a means of compressing digital music into a smaller, more efficient format; Cardi, W. Jonathan. "Uber-Middleman: Reshaping the Broken Landscape of Music Copyright." *Iowa L. Rev.* 92 (2006): 835.

music revolutionized to be distributed as a digital good.<sup>47</sup> Electronic devices that can play digital music devices such as *Apple Ipod* and *Dell JukeBox* have also contributed to the digitization of music.<sup>48</sup> As a result computers, digital networks and distribution channels such as *YouTube* have become popular for the dissemination and storage of music works.<sup>49</sup> This has had major implications on the music industry and collective management of copyright.<sup>50</sup> It has provided low cost access to music copyright protected works leading to the growth of electronic commerce in the music industry facilitated by file sharing systems such as Peer to Peer networks (P2P networks), torrents and other undetectable technologies. To this effect the dissertation explores the possibility of licensing online file sharing in Kenya through CMOs.

Communication technologies and the internet have facilitated the need to use copyright works beyond the primary use and facilitate creation through copying. This has led to the creation of transformative works such as UGCs.<sup>51</sup> Obtaining the authorization to use works in this manner has been considered difficult unless an existing licensing agreement has a provision guiding that process or the process exists as an exception to exclusive rights.<sup>52</sup> This also brings out a discussion of the importance of the fair dealing provisions<sup>53</sup> in determining the management of digital uses like file sharing and transformative works in form of UGCs<sup>54</sup> and defining the scope of exclusive rights. Discussion of the fair dealing provisions in Kenya's Copyright Act is necessary for this dissertation to explain limitations on the concept of exclusive rights attached to music works since they deprive right holders from managing their rights individually or collectively through CMOs.

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<sup>47</sup> Cardo op cit (n 46) at 7.

<sup>48</sup> Bockstedt, Jesse, Robert J. Kauffman, and Frederick J. Riggins. "The move to artist-led online music distribution: Explaining structural changes in the digital music market." *System Sciences, 2005. HICSS'05. Proceedings of the 38th Annual Hawaii International Conference on*. IEEE, 2005.

<sup>49</sup> Haunss, Sebastian. "The changing role of collecting societies in the internet." *Browser Download This Paper* (2013).

<sup>50</sup> Ibid.

<sup>51</sup> Internet has brought about creativity by using existing copyright works to create other copyright protectable works through transformative and derivative uses. This encourages the creation of parodies and other User Generated Content.

<sup>52</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>53</sup> Provisions limiting exclusive rights to allow fair use of works without authorizations from right holders; section 26 and 28 of KCA.

<sup>54</sup> Use existing IP protected works to create new work in digital distribution networks like YouTube.

The internet has enabled the creation of perfect copies of text, images and sounds that can be easily created, copied and transmitted at the click of a button.<sup>55</sup> Before the advent of digital technologies, each use fitted perfectly in one right. Reproduction right was meant for books and communication to the public was for broadcast.<sup>56</sup> Internet use changed this status quo by making a copyright work available in the internet a reproduction on the server and a communication to the public.<sup>57</sup> These technological developments raise questions as to the application of the right holders' exclusive rights: right of communication to the public, right of distribution, right of reproduction in the digital environment. It has also been difficult to enforce copyright online since internet users are often anonymous. With regard to this, the dissertation will discuss the concept of intermediary liability for online copyright infringement and its applicability in Kenya.

Copyright laws worldwide make provision for the right of reproduction<sup>58</sup> as a fundamental right attached to all types of works.<sup>59</sup> However, when music is in digital format the only way to stop copying is by creating an exclusive right to prevent access to work.<sup>60</sup> This raises the question of the effect of Technological Protection Measures (TPMs)<sup>61</sup> in Kenya and the anti-circumvention provisions in the Kenya Copyright Act. Section (i) in Chapter 3.2 discusses how CMOs may utilize these protective measures to enforce copyright on behalf of its members.<sup>62</sup>

There are two schools of thought with regard to the effect of digitization on copyright protected works with regard to operation of CMOs: one tier of the proponents holds the view that it will expand the mandate of CMOs due to the complexity of administering copyright<sup>63</sup>; while the other tier foresees a situation where CMOs will be phased out as right holders will have more control over access and use of their rights.<sup>64</sup> This dissertation relies on the argument that

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<sup>55</sup> Gervais op cit (n43) at 7.

<sup>56</sup> Gervais and Marushatop cit (n26) at 5.

<sup>57</sup> Ibid.

<sup>58</sup> Also referred to as the right to make copies.

<sup>59</sup> Miller, Ernest, and Joan Feigenbaum. "Taking the copy out of Copyright." *ACM Workshop on Digital Rights Management*. Springer, Berlin, Heidelberg, 2001.

<sup>60</sup> Section 106 of DMCA.

<sup>61</sup> That control access to music works against unauthorized uses.

<sup>62</sup> Christie, Andrew. "Reconceptualising Copyright in the Digital Era." *European Intellectual Property Review* 17 (1995): 522-522.

<sup>63</sup> Besen, Stanley M., Sheila N. Kirby, and Steven C. Salop. "An economic analysis of copyright collectives." *Virginia Law Review* (1992): 383-411.

<sup>64</sup> Handke, Christian, and Ruth Towse. "Economics of copyright collecting societies. Handke, Christian, and Ruth Towse. "Economics of copyright collecting societies." (2008).

digitization expands the role of CMOs to answer the research questions as developed in section 1.1. The school of thought that opines that digitization might phase out CMOs, base their argument on the fact that new technologies<sup>65</sup> enable right holders to initiate and maintain a direct relationship with the users thereby circumventing the transaction costs that makes collective management appear to be a cheaper route.<sup>66</sup> Nevertheless, this does not diminish the role of CMOs but highlights the need to reform the existing CMO structure to justify their continued existence.<sup>67</sup> This is not to say that the role and justification of CMOs is vanishing but that the role of CMOs is changing.<sup>68</sup>

To prove that digitization expands the role of CMOs this dissertation conceptualizes the rationale for CMOs in the digital era by placing the argument in a conceptual and theoretical framework in chapter two.

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<sup>65</sup> Information Technology firms such as *Microsoft, Apple and SonyBMG* have combined their services with rights management in order to dispense with the need to use CMOs.

<sup>66</sup> Stanley, Kirby and Salop op cit (n63) at 9; Gervais op cit (n24) at 5; Kretschmer, Martin. "The failure of property rules in collective administration: Rethinking copyright societies as regulatory instruments." *European Intellectual Property Review* 24.3 (2002): 126-137.; Zhang, Zijian. "Rationale of Collective Management Organizations: An Economic Perspective." *Masaryk UJL & Tech.* 10 (2016): 73.

<sup>67</sup> Gervais and Maurushatop cit (n26) at 5; Segal, Adam P. "Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act." *Santa Clara Computer & High Tech. LJ* 12 (1996): 97; McCoy, Michael D., and Needham J. Boddie. "Cybertheft: Will Copyright Law Prevent Digital Tyranny on the Superhighway." *Wake Forest L. Rev.* 30 (1995): 169.

<sup>68</sup> Gervais and Maurushatop cit (n26) at 5; Stanley, Kirby and Salop op cit (n63) at 9.

## **Chapter Two**

### **2.0. Rationales for the existence of CMOs in the digital era**

This chapter sets out justifications for music work copyright, collective management of music works and the need for copyright laws that address the specific technological changes in Kenya. It theorizes the concept of copyright using the utilitarian theory of IP. The economic rationale for collective management and the rationale for collective management in the digital environment lay foundation in support of the proposition that digital technologies have not phased out the need for CMOs. It also establishes the role of CMOs in management of copyright in the digital environment to be discussed in detail in chapter three of this dissertation. The legislative history of CMO regulation is used to show the evolution of legislation and thus advance a proposition for legislation that regulates copyright in the online environment and allows digital exploitation of music works.

### **2.1. The theoretical framework for music work copyright**

Music work copyright gives economic rights to right holders.<sup>69</sup> The economic rights in the Copyright Act that are central to this dissertation are the right of reproduction, distribution and communication to the public.<sup>70</sup> Performers fit in the discussion of copyright in this dissertation since the definition of the right of communication to the public includes the live performance of a work and this right is the same for performers as for copyright owners. The main mandate of CMOs is to incentivize the exploitation of these exclusive rights for the benefit of a right holder. The theoretical framework lays the basis for enforcing the exclusive rights attached to music works which are in turn managed by CMOs on behalf of right holders.

The philosophical foundations of IP are centered on property rights theories.<sup>71</sup> The leading approaches explaining IP lie in the utilitarian theory springing from the ideas of Jeremy Bentham,<sup>72</sup> the labor theory of property originating from John Locke's writings in his second

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<sup>69</sup> Section 26 & 32 of the KCA.

<sup>70</sup> Section 26(1) of the KCA.

<sup>71</sup> Fisher, William. "Theories of Intellectual Property, New Essays on the Legal and Political Theory of Property." *Cambridge* (2001). Available at: <https://cyber.harvard.edu/people/tfisher/IP/Fisher%20IP%20Theory.pdf>.

<sup>72</sup> Ibid.

treatise on government<sup>73</sup> and the private property rights theory derived from the writings of Kant and Hegel.<sup>74</sup>

This dissertation adopts the utilitarian theory to explain the essence of music work copyright. Jeremy Bentham is the leading proponent for the utilitarian theory of property. He defined utility to be the “greatest good for the greatest number of people”.<sup>75</sup> The constitutional justification for IP is described as being utilitarian<sup>76</sup> since it protects IP to promote science, culture and trade.<sup>77</sup> The Kenyan law maker has leaned on the utilitarian approach as evidenced in the constitution which aims to maximize utility in the form of scientific and cultural progress by granting exclusive rights to authors and inventors as an incentive toward such progress,<sup>78</sup> subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation.<sup>79</sup> From this it follows that copyright is a creation of law to incentivize creation by preventing the dissemination of information before an author profits from his own creation.<sup>80</sup>

These exclusive rights are balanced against the rights of the society to use the creations (fair dealing provisions).<sup>81</sup> The fair dealing provisions in the Copyright Act are discussed for their prominent role in determining the scope of exclusive rights in the online environment. The researcher is inclined to hold the view that collective management is in line with utilitarianism since it is centered on incentivizing the dissemination of works and strikes a balance between the power of exclusive rights to encourage creation of music works and the tendency of such rights

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<sup>73</sup> “If one uses labor to transform a resource held in common and from its state of nature, such a person is entitled to an exclusive right from that new creation. William Fisher criticizes this theory for bringing the problem of proportionality when applied to intellectual property. It does not explain why labor added to a resource held in common should entitle one to a property right in such resource. Ibid; Rafiei, Gholamreza. *The possibility of granting new legal protection and IP rights to broadcasting organizations against the unauthorized exploitation of their broadcasts*. Diss. Université de Neuchâtel, 2015.

<sup>74</sup> Hughes describes private property as being crucial for satisfaction of some human needs and thus IP rights should protect authors’ creations since they create economic and social conditions required to enhance intellectual activities; Hughes, Justin. “The philosophy of intellectual property.” *Geo. LJ* 77 (1988): 287.

<sup>75</sup> Fisher op cit (n71) at 11.

<sup>76</sup> Ibid.

<sup>77</sup> Article 11(2)(c) & 40(5) of the Constitution of Kenya.

<sup>78</sup> Moore, Adam D. “Intellectual property, innovation, and social progress: the case against incentive based arguments.” *Hamline L. Rev.* 26 (2002): 601.

<sup>79</sup> Nahar, Lutfun. “Human Rights Perspective on the Role of WIPO in Promoting Intellectual Creativity.” (2012).

<sup>80</sup> Adam D op cit (n78) at 12.

<sup>81</sup> Hettinger, Edwin C. “Justifying intellectual property.” *Philosophy & Public Affairs* (1989): 31-52.

to hinder widespread public enjoyment and use of the works.<sup>82</sup> This is based on the intermediary role played by CMOs between music work right holders and users. For these reasons the utilitarian theory is the most effective in analyzing the legal framework for collective management of music work in Kenya.

## **2.2. Rationales for collective management**

*“It would be utopian to imagine that an author could undertake the individual [management]...of his musical works, even... [in his own country]..., only collective [management]...of the repertoire of music works by a specific [CMO]... is materially, economically and legally practicable.”<sup>83</sup>*

This section explains the essence of collective management by showing how collective management facilitates the dissemination of music works (economic rationale) and justifies the need for collective management in the digital environment (digital rationale). Thereafter, it provides the role and advantages of CMOs as derived from the economic and digital rationales of collective management.

### **2.2.1. Economic rationale for collective management:<sup>84</sup>**

Collective management presents a cost effective way for right holders to control use of their works where it would have been unmanageable because of the large numbers of right holders and users involved during the licensing process.<sup>85</sup> Secondly, CMOs value work in the same repertoire and on the same economic footing. This enables right holders to use the power of collective bargaining to get more remuneration for the use of their copyright protected works and negotiate with multinational users on a more balanced basis.<sup>86</sup> Further, collective management through CMOs facilitates easy access to the rights needed by users for legal and authorized use of copyright protected material and reduce transaction costs of licensing, payment and protection of copyright.<sup>87</sup> They spare right holders and users from the hurdle of negotiating the exact size of

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<sup>82</sup> Nzomo, Victor B. "Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies." (2014).

<sup>83</sup> Tournier, J. L. & Joubert, C 1986, "Collective Administration and Competition Law", Copyright.

<sup>84</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid; Stanley, Kirby and Salop op cit (n63) at 9.

<sup>87</sup> Ibid; Day op cit (n39) at 7.

the bundle of rights and its price for every transaction.<sup>88</sup> In these ways collective management facilitates the market between right holders and users of music works.

### **2.2.2. Rationale for collective management in the digital environment**

Collective management offers the most workable solutions for copyright at a time of rapid technological advances.<sup>89</sup> Claims that copyright is not effective in the digital environment are caused by the inability to use copyright in a lawful manner.<sup>90</sup> This inability to control use of protected works in the online environment makes copyrighted works unavailable legally on the internet. CMOs present a way of organizing use of digital works online and ensuring the authorized use of protected works through orderly and user friendly licensing procedures.<sup>91</sup>

CMO expertise and knowledge in copyright law is considered to be essential in making copyright work in the digital age by enabling the dissemination of works where individual management is rendered impractical.<sup>92</sup> The fact that the internet presents an opportunity for right holders to exercise their rights individually<sup>93</sup> does not mean that individual management of copyright is in the interest of right holders.<sup>94</sup> Users may need additional technological devices to assist in copyright protection despite having the ability to authorize use of music works in the internet.<sup>95</sup> The reasons in favor of collective management in the analogue era still exist in the digital era.<sup>96</sup> Additionally, CMOs may utilize technologies such as DRMs to monitor use of work and prevent infringements online thus facilitating better management of copyright in the digital sphere.

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<sup>88</sup> Snow, Arthur, and Richard Watt. "Risk sharing and the distribution of copyright collective income." *Developments in the economics of copyright: Research and analysis* (2005): 23-36.

<sup>89</sup> Hutchinson, J. "Collection and Distribution of Performing and Mechanical Royalties: A View from the UK." *COPYRIGHT WORLD* (1998): 30-32.; Jehoram, Herman Cohen. "The future of copyright collecting societies." *European Intellectual Property Review* 23.3 (2001): 134-139 C. Jarvis, "Broadcasts: Collective Licensing — The End or a New Beginning? As quoted in Kendrick, J. M. "Collective Licensing: Past, Present and Future." *Reports presented at the meeting of the International Association of Entertainment Lawyers, Maklu*. 2002.

<sup>90</sup> Gervais op cit (n43) at 7.

<sup>91</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>92</sup> Gervais op cit (n43) at 7.

<sup>93</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.



The functionality of CMOs in the online environment is dependent on their ability to adapt to the needs of users and right holders in the digital sphere.<sup>97</sup> This adaptation may only occur when CMOs acquire the rights needed to facilitate the management of digital exploitation of copyright through legislative provisions. The researcher is of the view that digital technologies set out the need for effective collective management of music works.

### **2.2.3. Why are CMOs essential in the management of digital exploitations of music works as derived from the economic and digital rationales of collective management?**

The traditional role of CMOs as was necessitated by the Berne Convention is centered on facilitating access to copyright after the introduction of the right of public performance and broadcasting. CMOs facilitate the access to copyright protected works by acting as intermediaries between the right holders and users for purposes of licensing.<sup>98</sup> It follows that the main functions of CMOs revolve around ensuring authorized uses of music works under their management. Despite the threats by new technologies to phase out CMOs, they remain relevant in facilitating these authorized uses. CMOs help to organize online markets that allow right holders to disseminate music works and facilitate the use and re-use protected works in the online environment. They do this through performance of the following functions:

- a. “documentation of works and agreements entered into by right holders in respect of these works,
- b. licensing use and reuse of work,
- c. monitoring use of work to enforce conditions of the license,<sup>99</sup>
- d. negotiating with users and collecting royalties,
- e. distributing royalties to respective right holders,
- f. Taking legal action against those who infringe the copyrights which they are mandated to manage (enforcing copyright).”<sup>100</sup>

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<sup>97</sup> Technology may have an effect of making individual management a more feasible solution in certain cases thus minimizing the role of CMOs.

<sup>98</sup> Gervais and Marushatop cit (n26) at 5.

<sup>99</sup> Ibid.

The main advantages of utilizing CMOs for the management of music work copyright in the digital environment include:

- a. Enabling music work right holders to control their works in the internet by presenting a means of controlling use of their works in the analogue and digital environment through their licensing and monitoring functions;
- b. The ability to enable massive uses of copyright in the digital environment. Since it is either impractical or difficult to maintain a direct relationship between right holders and users online, CMOs facilitate legal use of works while generating remuneration for the right holders in form of royalties;
- c. Creating security for users against infringement cases and damages for unauthorized uses;
- d. Enabling right holders and authors of copyrighted works to use collective bargaining power to obtain more for use of work and negotiate on a less unbalanced platform with these international media giants;<sup>101</sup>
- e. Reducing transaction costs that are involved in the overall management of copyright.

### **2.3. Justification for the specific regulation of copyright in the online environment in Kenya**

Arguments against the applicability of a technology neutral copyright law will be used as a basis for advancing the need to modernize Kenyan copyright law and address the digital problems that CMOs face in management of copyright. The legislative history traces how copyright law and collective management laws in the world and Kenya have advanced in the past to regulate copyright through changing technologies. This is then used to justify the need for explicit regulatory provisions for copyright in the online environment which will then expand the role of CMOs in managing copyright.

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<sup>100</sup> Hollander, Abraham. "Market structure and performance in intellectual property: The case of copyright collectives." *International Journal of Industrial Organization* 2.3 (1984): 199-216.

<sup>101</sup> Gervais op cit (n43) at 7.

The concept of technological neutrality implies that law is media neutral and applies “equally regardless of the format of work.”<sup>102</sup> In analyzing this concept Chris Reed considers the right to authorize communication of a work to the public as granted in copyright law as achieving the purpose of technological neutrality when it is not limited to communication offline or online.<sup>103</sup> However, this concept is considered a myth given the inability of legislators to predict whether to regulate a new technology until that technology is known to them.<sup>104</sup> This theory is misguided as it leads to the inconsistent application of copyright law.<sup>105</sup> Orin Kerr also refutes the applicability of technological neutrality since the functional equivalence<sup>106</sup> of effects of new technologies with analogue provisions is not at par with the reality brought by these technologies.<sup>107</sup> This proposition is supported by the United States decision in *Capitol Records, LLC v ReDigi Inc*<sup>108</sup> which held that the first sale defense with reference to exhaustion of rights<sup>109</sup> is not applicable to digital goods. Functionally, the sale of digital music was equivalent to the sale of CDs and would therefore protect *ReDigi* from liability by applying the principle of exhaustion of rights. Nevertheless, the court considered the physical process of transferring the digital music clearly proving the inapplicability of analogue laws to digital uses of copyright protected works.

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<sup>102</sup> Whether analogue or digital; Lipinski, Tomas A. "The myth of technological neutrality in copyright and the rights of institutional users: Recent legal challenges to the information organization as mediator and the impact of the DMCA, WIPO, and TEACH." *Journal of the Association for Information Science and Technology* 54.9 (2003): 824-835.; Samuelson, Pamela. "Preliminary thoughts on copyright reform." *Utah L. Rev.* (2007): 551. ; Convincing jurisprudence on technological neutrality was developed in Canada in the case of *Apple Computer Inc v Mackintosh Ltd.* [1987] 1 FC 173 (TD) aff'd [1990] 2 SCR 209 the defendant was accused of infringing on copyright in Apple computer programs by reproducing and selling unauthorized clones of apple computers. The federal and Supreme Court applied copyright law to hold the defendant liable for reproduction despite using reproduction technologies that had not been contemplated at the time of drafting the Act. Siu, Kevin P. "Technological Neutrality: Toward Copyright Convergence in the Digital Age." *U. Toronto Fac. L. Rev.* 71 (2013): 76.

<sup>103</sup> Reed, Chris. "Taking sides on technology neutrality." *SCRIPTed* 4 (2007): 263.

<sup>104</sup> Greenberg, Brad A. "Rethinking Technology Neutrality." *Minn. L. Rev.* 100 (2015): 1495.

<sup>105</sup> "When deciding copyright infringement cases, Judges are torn between considering the use facilitated by the technology or the process that enabled such use in order to find a functional equivalence of the technology in the analogue copyright laws"; Ibid.

<sup>106</sup> Functional equivalence "involves an examination of the function fulfilled by traditional form requirements and a determination as to how the same function could be transposed in a dematerialized environment" (JAE Faria 'E-commerce and international legal harmonization: Time to go beyond functional equivalence?' (2004) 16(4) *SA Merc LJ* 529, 531 note 9).

<sup>107</sup> Orin S Kerr, "The Problem of Perspective in Internet Law" (2003) 91 *Geo LJ* 357 as cited in Siu, Kevin P. "Technological Neutrality: Toward Copyright Convergence in the Digital Age." *U. Toronto Fac. L. Rev.* 71 (2013): 76.

<sup>108</sup> No 12 Civ 95 (RJS) (SD NY 2013) [*ReDigi*].

<sup>109</sup> Exhaustion of right is a limitation on intellectual property that allows the owner of a good to resell without infringing on the initial owner's rights.

This dissertation observes that copyright law is not technology neutral and asserts the importance of this law to respond to digital changes. The responses will take into account the rights of users in the cyberspace. The preceding paragraphs in this section use the legislative history of and collective management and copyright law in Kenya to support the position that copyright law has been adapting in order to continue being relevant in regulating copyright even in changing times.

### **2.3.1. The legislative history of provisions regulating collective management of copyright**

The 1709 British Statute of Anne is considered to be the first copyright statute.<sup>110</sup> It is the origin of many collective management statutes.<sup>111</sup> Music copyright gained explicit copyright protection under the Statute of Anne following an English court case of 1777 where music was described to be writing within the Statute of Anne. The same year a famous author by the name Beaumarchais called a meeting with other authors to resolve issues surrounding under remuneration for use of their work.<sup>112</sup> Beaumarchais was the first to express the idea of collective management and founded the first copyright collecting society for composers in 1719. Action by the group of authors and Beaumarchais, led to the enactment of the General Statutes of Drama in Paris. These statutes were amongst the first laws that dealt with the plight of authors in circumstances where users exploited their work without license.<sup>113</sup>

In 1787 the United States Constitution recognized the concept of intellectual property. In France, Pierre Augustin Caron persuaded the French government to come up with legislation that addressed the right of public performance. The government yielded to these requests and passed the “sur le droit d'auteur” of 1793. In 1838, Honoré Balzac and Victor Hugo established the Société des Auteurs et Compositeurs Dramatiques (the Society of French writers) Beaumarchais Prussian (1837).<sup>114</sup>

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<sup>110</sup> Bently, Lionel, Uma Suthersanen, and Paul Torremans, eds. *Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace*. Edward Elgar Publishing, 2010.

<sup>111</sup> Ibid; Nzomo, Victor B. "Rethinking the Regulation of Collective Management Organisations in Africa: Legislative Lessons from Kenya, South Africa and Nigeria." (2016).

<sup>112</sup> <http://www.gutenberg-e.org/brg01/print/brg05.pdf>.

<sup>113</sup> Ibid.

<sup>114</sup> Gervais op cit (n43) at 7.

“Events leading to a fully developed collective management started in 1847 when Paul Henrion, Victor Parizot,” Ernest Bourget and their publishers brought a suit against “Ambassadeurs” (a café concert) in Paris.<sup>115</sup> They opposed the idea that they had to pay for their seats and meals in the café while they did not get paid when their music was performed during the concert.<sup>116</sup> The court held that the owner of the concert was supposed to pay substantial remuneration to the complainants.<sup>117</sup> This decision gave rise to the right to public performance of dramatic works which could not be controlled and enforced individually by then.<sup>118</sup> In 1851, the French society SACEM (Society of Authors, Composers and Music Publishers) was established to administer public performance rights in musical works.<sup>119</sup>

The Berne Convention was adopted in 1886 becoming the first international instrument to regulate copyright at an international level. In Article 11 it recognizes the right to public performance as an important right of authors. This right created the initial need for collective management. Thereafter, CMOs were formed in other countries to administer the rights of authors and composers of musical works.<sup>120</sup>

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA; English: Society for musical performing and mechanical reproduction rights), the German CMO was founded in 1903 and the Performing Rights Society (PRS), the UK CMO was established in 1914.<sup>121</sup>

“In 1925, Romain Coolus organized the Committee for the Organization of Congresses of Foreign Authors’ Societies” to solve international issues on collective management.<sup>122</sup> “At around the same time, Firmin Gémier created the Universal Theatrical Society.”<sup>123</sup> These occurrences led to the formation of the International Confederation of Societies of Authors and Composers (CISAC) which was formed in 1926.

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<sup>115</sup> Mihály op cit (n15) at 4.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Little, Jonathan D. "History of copyright: a chronology in relation to music." *Music business journal* (2001).

<sup>120</sup> Mihály op cit (n15) at 4.

<sup>121</sup> file:///C:/Users/G/Downloads/CISACUniversity\_The\_History\_of\_Collective\_Management\_FINAL.pdf.

<sup>122</sup> Gervais, Daniel. "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content." *Vand. J. Ent. & Tech. L.* 11 (2008): 841.

<sup>123</sup> Ibid.

The International Federation of Reprographic Reproduction Organizations (IFRRO)<sup>124</sup> and CISAC<sup>125</sup> facilitate the cooperation of CMOs to ensure efficient management of rights. CMOs mainly belong to either of these two associations of CMOs.<sup>126</sup> They emphasize on the need to use collective licensing for the benefit of right holders and users.<sup>127</sup>

#### **2.4. Evolution of CMO regulation in Kenya**

The UK became a party of the Berne Convention in 1887.<sup>128</sup> In the pre-colonial period copyright in Kenya was regulated by English common law and British statutes, according to the East Africa Order in Council of 1897. Consequently “Kenya’s copyright law has evolved from the 1842, 1911 and 1956 United Kingdom Copyright Acts.”<sup>129</sup> The current copyright system is considered to be modeled on the British Imperial Copyright Act of 1911.<sup>130</sup>

Kenya was a British Colony until 1963 when it gained independence. Development of Kenya Copyright law began in 1966 by enacting the Copyright Act, 1966, Act No. 3 of 1966, which replaced the UK Copyright Act of 1956. In 1975, the Copyright Act No. 3 of 1975 amended the 1966 Act to conserve the national cultural heritage and economic welfare.<sup>131</sup> This Act was amended in 1982<sup>132</sup> to introduce the term “infringing copy” and to redefine infringement to include direct or indirect activities such as importing or causing the importation of infringing copies.<sup>133</sup> This amendment introduced remedies and increased the penalty for criminal infringement.

The Copyright (Amendment) Act of 1989 “defined the term author to include the author of a computer programme.”<sup>134</sup> It also introduced the term audio visual work to replace cinematographic work. In 1992, the Act was amended to define a competent authority and a

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<sup>124</sup> Formed in 1980.

<sup>125</sup> Formed in 1926.

<sup>126</sup> Gervais op cit (n43) at 7.

<sup>127</sup> Ibid.

<sup>128</sup> [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15).

<sup>129</sup> Sihanya, Ben. "Copyright law in Kenya." (2010); Armstrong, Chris, ed. *Access to knowledge in Africa: The role of copyright*. IDRC, 2010.

<sup>130</sup> Marisella, Ouma, and Ben Sihanya. "Access to Knowledge in Africa: The Role of Copyright: 'Kenya.'" University of Nairobi, 2010.

<sup>131</sup> Sihanya (n129) at 20.

<sup>132</sup> Copyright Act(Amendment) Act, 1982, Act No. 5 of 1982.

<sup>133</sup> Sihanya op cit (n129) at 20.

<sup>134</sup> Ibid.

licensing body.<sup>135</sup> This Authority's mandate was similar to the supervisory role of the Kenya Copyright Board (KECOBO). KECOBO is a statutory body established in section 3 of the Copyright Act and oversees the implementation of the copyright laws in Kenya, licensing and supervising the activities of CMOs in Kenya.<sup>136</sup> This licensing body's operation in the Act was similar to that of CMOs.<sup>137</sup> The Music Copyright Society of Kenya (MCSK) was considered to be a licensing body as per the Act. MCSK was the first collecting society to be formed in Kenya in the year 1985. MCSK is a member of the International Confederation of Societies of Authors and Composers (CISAC). CISAC sets out compulsory obligations and rules for all member CMOs.<sup>138</sup>

Kenya joined the World Trade Organization (WTO) in 1995 and was bound to the TRIPS Agreement in the same year by virtue of article II.2 of the Agreement Establishing the WTO.<sup>139</sup> In 1995 the Copyright Act was amended<sup>140</sup> "to redefine '*broadcasting*' to include wireless, wired, and satellite transmission and reception of images and sound and '*copy*' to mean "a reproduction of a work in any form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means."<sup>141</sup>

When Kenya acceded to the Berne Convention in 1993 it amended the copyright Act to extend the protection to works protected in Berne member states.<sup>142</sup> The Copyright Act No. 12 of 2001 was established to be in line with obligations under the WTO TRIPS Agreement of 1994 Agreement and the WIPO Internet Treaties of 1996 (WIPO Copyright Treaty and the WIPO PPT) made major changes to the Copyright Act. It redefined the term '*copy*' to encompass reproduction technologies.<sup>143</sup> It also provided a definition for communication to the public that

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<sup>135</sup> Section 17 of the Copyright (Amendment) Act, 1992.

<sup>136</sup> Section 3 & 5 of the KCA.

<sup>137</sup> Amendment of section 17 of Copyright (Amendment) Act, 1992, No. 11 of 1992.

<sup>138</sup> Uchtenhagen, Ulrich. *The Setting-up of New Copyright Societies: Some Experiences and Reflexions*. No. 926. WIPO, 2005.

<sup>139</sup> Nzomo, Victor B. "In the Public Interest: How Kenya Quietly Shifted from Fair Dealing to Fair Use." (2016).

<sup>140</sup> Amendment of Section 2 by the Copyright (Amendment) Act No. 9 of 1995 .

<sup>141</sup> Sihanya Bernard M "Copyright Law in Kenya", Innovative Lawyering & Copyright Africa, 2009.

<sup>142</sup> The Copyright (Amendment) Regulations, 2000 LN 125/2000.

<sup>143</sup> Section 2 of the KCA.

differentiated it with broadcasting.<sup>144</sup> This statute provided for the anti-circumvention of DRMs and TPMs.<sup>145</sup>

Before 2001 there was no legal and institutional framework for collective administration of copyright.<sup>146</sup> The Copyright Act No. 12 of 2001 establishes the Kenya Copyright Board (KECOBO) in section 3. KECOBO is tasked with the overall administration and enforcement of copyright and related rights and to supervise activities of CMOs in Kenya as per section 5(b) of the Act. KECOBO licenses CMOs which meet the requirements set out in section 46(4) of the Act. The body has to:

- a) “be a company limited by guarantee;
- b) be a nonprofit making entity;
- c) have rules and regulations that contain provisions to ensure interests of the members are adequately met;
- d) have principal objectives of collection and distribution of royalties;
- e) take accounts which are regularly audited by external auditors.”<sup>147</sup>

The Statute Law (Miscellaneous Amendments) Act 2012 introduced section 30A into the Copyright Act which provides for payment of equitable remuneration for performers through the respective collecting society. The decision in *Xpedia Management Limited & 4 others v Attorney General & 5 others*<sup>148</sup> offered an interpretation of this section. It was held that section 30A puts collecting societies in a position of trust and they can represent a non member who has copyright.

A further amendment to the Act is proposed for section 30, on performers’ claim to a share of the blank media levy. The proposed amendment seeks compensation for this private copying levy be collected by Kenya Copyright Board and distributed to the copyright collecting society registered in Kenya with respect to performers.

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<sup>144</sup> Ibid.

<sup>145</sup> Marisella Ouma, *Challenges to the legislative Framework and Norm setting in the Digital Environment*. Kenya Copyright Board. Available at: <http://studylib.net/doc/5546547/challenges-to-the-legislative-framework-and-norm>.

<sup>146</sup> Sihanya op cit (n129) at 20.

<sup>147</sup> Section 46(4) of the KCA.

<sup>148</sup> [2016] eKLR.



There are five registered CMOs in Kenya: Music Copyright Society of Kenya (MCSK), Kenya Association of Music Producers (KAMP), Performers Rights Society of Kenya (PRiSK), Reproduction Rights Society of Kenya (KOPIKEN) and the Music Publishers Association of Kenya (MPAKE).<sup>149</sup>

This dissertation takes the position that the expansion of CMOs roles and effective management of music works in the digital environment is dependent on the legislative provisions. The researcher uses the legislative history of collective management to indicate of how the law changes to adapt to technological advancement and finds it imperative to provide the current legislative framework of Collective Management in Kenya in order to analyze whether it enables the efficient management of copyright in Kenya.

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<sup>149</sup> Sihanya & Ouma op cit (n130) at 20.

## **Chapter Three**

### **3.0. Collective management of music work in the digital era in Kenya**

Kenya's national and international instruments on copyright and collective management facilitate the activities of CMOs in the digital era. Firstly, this section sets out the Kenyan CMO system with emphasis on how legislation enables the management of music work copyright in the digital sphere. This is based on the fact that collective management has become an integral part of copyright legislation as established in chapter two of this dissertation. Secondly, it discusses the digital uses of music copyright under research and Kenya's response to the digital problems that CMOs face due to online exploitation of music works. This will be done based on an analysis of the current copyright law with regard to its ability in regulating these digital uses and facilitating collective management. Thirdly, it discusses how these digital uses assert the need for CMO operation in the digital environment in Kenya.

#### **3.1. The legislative framework for collective management of music work copyright**

The Judicature Act<sup>150</sup> identifies the sources of law in Kenya to be the Constitution, Statutes, delegated legislation, common law, the principles of equity, case law and African customary law. These are sources of law for collective management of music work copyright in Kenya. However, this section will provide provisions in the Constitution, statutes, regulations and conventions.

##### **3.1.1. The Constitution of Kenya (2010)**

The Constitution of Kenya lays the main foundation for the protection of music copyright and Collective Management.<sup>151</sup> Article 11(2) (c) of the Constitution protects music work copyright for being part of IP. It describes IP as cumulative civilization and an expression of the

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<sup>150</sup> Chapter 8 Laws of Kenya.

<sup>151</sup> Article 2 of the Constitution of Kenya provides that: 'the Constitution is the Supreme law and binds all persons and the State.'

nation.<sup>152</sup> Further it protects property in IP rights<sup>153</sup> through inclusion in the definition of property.<sup>154</sup>

The application of treaties and international law in the area of copyright and collective management is guided by articles 2(5) and 2(6) of the Constitution. The Berne Convention and the TRIPS Agreement have been directly incorporated into Kenya's copyright laws and as part of sources of law.<sup>155</sup> On the other hand, treaties such as the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT); which have been signed but not ratified remain persuasive as to the regulation of copyright in the online environment but do not form part of Kenyan law.

The Constitution enables collective management through provision for the freedom to form, join or participate in an association of any kind.<sup>156</sup> This section has been interpreted in the realm of collective management in Kenya following the amendment of the Copyright Act in 2012 to introduce section 30A<sup>157</sup>. In *Mercy Munee Kingoo & another v Safaricom Limited & another*<sup>158</sup> section 30A of the Copyright Act was held to be unconstitutional<sup>159</sup> for limiting the point at which remuneration for use of copyright works is to be received. The above decision was preceded by *Xpedia Management Limited & 4 others v Attorney General & 5 others* [2016] eKLR,<sup>160</sup> which held that section 30A puts collecting societies in a position of trust and does not compel right holders to join CMOs.

KECOBO is subject to constitutional provisions for being a statutory body in charge of supervising activities of CMOs in Kenya.<sup>161</sup> It is guided by the national values<sup>162</sup> in interpreting the Constitution, the Copyright Act when implementing public policy decisions according to

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<sup>152</sup> Article 11(2)(c) of the Constitution of Kenya.

<sup>153</sup> Article 40(5) of the Constitution of Kenya.

<sup>154</sup> Article 260, 24, 25 of the Constitution of Kenya.

<sup>155</sup> Article 2(6) of the Constitution of Kenya; Treaty Making and Ratification Act No.45 of 2012; Orago, Nicholas Wasonga. "The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective." *African Human Rights Law Journal* 13.2 (2013): 415-440.

<sup>156</sup> Article 36 of the Constitution of Kenya.

<sup>157</sup> Statute Miscellaneous (Amendment Act), 2012.

<sup>158</sup> [2016] eKLR.

<sup>159</sup> Contrary to article 36 of the Constitution of Kenya.

<sup>160</sup> [2016] eKLR.

<sup>161</sup> Article 10 & 47 of the Constitution of Kenya.

<sup>162</sup> They include, but not limited to the following: 'equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability; sustainable development.' Article 10 of the Constitution of Kenya.

their mandate as set out in section 5 of the Copyright Act. The Board's administrative actions such as registering and deregistering CMOs are subject to constitutional provisions in article 47 on administrative action.

### **3.1.2. The Berne Convention**

The Berne Convention is important in this research for being the first international instrument to unify copyright regulation amongst member countries<sup>163</sup> and to create the initial need for collective management. Kenya acceded to this convention in March 1993 and ratified it in June 1993. Consequently, this convention forms part of Kenyan law. Moreover the Copyright Act incorporates provisions in the Berne Convention except the Berne Appendix that regulates compulsory licensing for the translation of texts.<sup>164</sup>

This Convention has constantly been revised approximately every twenty years.<sup>165</sup> The 1948 revision is central to the research concerns in this dissertation. This revision extended protection of music works to any communication to public of performance and the right of broadcasting was to cover any communication to the public by wire or by means of rebroadcasting. Resultantly, this revision impacted Kenya's copyright legislation to that effect.

The provisions in Article 11bis (2) and Article 13(1) are defined to be the basis of voluntary licensing and Collective Management in member countries.<sup>166</sup> For this reason, this dissertation submits that the Berne Convention provides the main foundation for the voluntary licensing of copyright through CMOs in Kenya.

### **3.1.3. The TRIPS Agreement**

The TRIPS Agreement contains almost all conditions in the Berne Convention, it was enacted to harmonize laws of World Trade Organization (WTO) members who had not ratified the Berne Convention to be in line with member countries of the Berne Convention. Signing of

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<sup>163</sup> The Preamble of the Berne Convention expresses the desire to protect copyright in an effective and uniform manner.; The UK Copyright Service (2004) "International copyright law - The Berne Convention", Available at: [http://www.copyrightservice.co.uk/copyright/p08\\_berne\\_convention](http://www.copyrightservice.co.uk/copyright/p08_berne_convention) .

<sup>164</sup> Armstrong (n129) at 20.

<sup>165</sup> in 1908, 1928, 1948, 1967, 1971 and 1979;

[http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct\\_wppt.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf).

<sup>166</sup> Article 11bis (2) and article 13(1) provide that member countries may determine conditions for exercise of exclusive rights.; M. Fisor, Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory.

the TRIPS Agreement led Kenya to enact the Copyright Act, 2001 as a requirement for Kenya to amend its laws in order to be TRIPS compliant.

#### **3.1.4. The internet treaties**

The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty of 1996 (WPPT) are referred to as the internet treaties.<sup>167</sup> The internet treaties inform the area under research in this thesis since they were formed to set different international norms to regulate copyright in the digital context.<sup>168</sup> Although the two treaties are cumulatively referred to as internet treaties, the WCT states that there is no connection or relationship between the two.<sup>169</sup> Kenya signed the WCT and the WPPT on 20<sup>th</sup> December 1996 but has not ratified these treaties 21 years later making the provisions in the treaties not part of copyright law in Kenya.<sup>170</sup> Nevertheless, this research will use these treaties to give recommendations on what Kenya should consider when amending her current copyright laws. This dissertation will focus on the WCT since the discussion is centered on copyright matters.

The WCT is a special agreement of the Berne Convention<sup>171</sup> for contracting parties that are Berne Convention members. It was adopted as a response to new economic, social, cultural and technological developments that affect copyright.<sup>172</sup> This treaty introduces new international rules that clarify the interpretation of certain existing provisions to be in line with these new developments.<sup>173</sup> The WCT has been described as the treaty that provides “copyright protection for computer programs, databases, and digital communications, and transmission of protected works via the Internet and computer networks”.<sup>174</sup> It covers general provision for the transmission and storage of works<sup>175</sup>, technological protection measures and rights

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<sup>167</sup> Ficsor, Mihály. *Law of Copyright and the Internet: The Wipo Treaties and Their Implementation*. Oxford University Press, 2001; Ficsor, Mihály. "Copyright for the Digital Era: the WIPO Internet Treaties." *Colum.-Vla JL & Arts* 21 (1996): 197.

<sup>168</sup> Okediji, Ruth. "The regulation of creativity under the WIPO Internet Treaties." (2009).

<sup>169</sup> Article 1(1) of the WCT.

<sup>170</sup> Article 2(6) of the Constitution of Kenya; [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16).

<sup>171</sup> Article 20 of the Berne Convention.

<sup>172</sup> Preamble to the WIPO Copyright Treaty.

<sup>173</sup> Ibid.

<sup>174</sup> [https://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/lipa/copyrights/WIPO%20COPYRIGHT%20TREATY.pdf](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/copyrights/WIPO%20COPYRIGHT%20TREATY.pdf); [http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct\\_wppt.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf).

<sup>175</sup> Article 9 of the WCT.

management<sup>176</sup>, the right of distribution<sup>177</sup>, right of communication to the public<sup>178</sup> and limitations and exceptions.<sup>179</sup>

### **3.1.5. The Copyright Act, 2001**

The Copyright Act is the main legislation under review in this dissertation. It regulates copyright and collective management in Kenya. This Act contains the exclusive rights of music copyright holders under research in this dissertation. Section 26 of the Act, provides these rights to include:

- a. “ Reproduction in any material form of the original work or its translation or adaptation;
- b. Distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement;
- c. Communication to the public and
- d. Broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original.”<sup>180</sup>

Copyright owners in Kenya can exercise their exclusive rights in section 26 of the Copyright Act through assignment and licensing. The limitations and exceptions of these exclusive rights in this Act will be discussed for their crucial importance in defining the scope of the rights in the digital environment in the next section.<sup>181</sup> The anti-circumvention provisions on electronic rights management in section 35 (3) (c), 35(3) (d) and 36 of the Act will be discussed owing to their effectiveness in protecting music copyright in the digital environment.

Section 46(1) of the Act provides a prerequisite of licensing before a CMO commences operation in Kenya. Further, the provisions of section 46(5) allow for the registration of one CMO per each class of rights or category of works. Currently, there are two CMOs (MCSK and MPAKE) representing music work right holders in Kenya. This is in adherence to the exception of section 46(5) which allows such a situation when a CMO does not function to the satisfaction

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<sup>176</sup> Article 11 & 12 of the WCT.

<sup>177</sup> Article 6 of the WCT.

<sup>178</sup> Article 8 of the WCT.

<sup>179</sup> Article 10 of the WCT.

<sup>180</sup> Section 26(1) of KCA.

<sup>181</sup> Ibid.

of its members.<sup>182</sup> For the first time, there are two collecting societies representing the same group of right holders for same work in Kenya.

KECOBO is given power to deregister a CMO by notice in a gazette if the CMO is not functioning properly.<sup>183</sup> The interpretation of this power accorded in section 46(9) has been problematic since it is not clear whether deregistration should occur if all the four conditions are present or when one condition is present.<sup>184</sup> In March 2017, KECOBO denied to renew MCSK's license for failing to file the annual reports contrary to section 47 of the Copyright Act and Regulation 16 of the Copyright Regulations. MCSK took the matter to court for determination, and is currently operating on the basis of a conservatory order suspending the decision by KECOBO.

The Act provides for civil<sup>185</sup> and criminal liability<sup>186</sup> for copyright infringement. Civil liability for copyright infringement occurs where a person other than the copyright owner, licensee or assignee makes, distributes or imports for commercial gain an infringing copy of protected works.<sup>187</sup> Further, the anti-circumvention of any effective copyright protective measure and manufacture of devices for this anti-circumvention is deemed to be an infringement as per section 35(3) of the Copyright Act. Civil remedies for these infringements in the Act include: damages, injunction, delivery up of items and damages on basis of royalty. On the other hand criminal liability for copyright infringement in respect to a sound recording is imposed where a person makes available any audio recording equipment for commercial purposes to another for purposes of making copies of the sound recording without payment of the royalties.<sup>188</sup> Secondly, the use of a machine to reproduce a security device is a criminal offence.<sup>189</sup> Additionally,

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<sup>182</sup> Section 46(5) of KCA.

<sup>183</sup> Section 46(9) of the KCA: KECOBO may deregister a CMO if it is acting contrary to its Memorandum and Articles of Association or interests of its members, has altered its rules and refused to comply with provisions in the Act.

<sup>184</sup> Nzomo op cit (n82) at 13.

<sup>185</sup> Section 35 of KCA.

<sup>186</sup> Section 43 of KCA.

<sup>187</sup> Section 35(1) of KCA.

<sup>188</sup> Section 28(6) of KCA: 'any person found guilty of this offence shall be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding four years or to both.'

<sup>189</sup> Section 36(b) of KCA: 'any person found guilty of this offence 'shall be liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.'

infringement on the exclusive rights of a performer in section 38(1) of the Act<sup>190</sup> is a criminal offence in the Copyright Act. Finally, giving false information to a copyright inspector is an offence under the Act.<sup>191</sup>

The Act vests the role of copyright enforcement on KECOBO<sup>192</sup>, the National Police Service<sup>193</sup>, the judiciary<sup>194</sup> and the Anti-counterfeit agency. KECOBO has an enforcement department which comprises of five (5) prosecutors and ten (10) copyright inspectors.<sup>195</sup> These copyright inspectors are attached from the National Police Service and are trained to investigate matters relating to copyright.<sup>196</sup>

### **3.1.6. The Copyright (Amendment) Regulations, 2016**

The Attorney General made the copyright regulations as per section 49 of the Copyright Act.<sup>197</sup> The following are the regulations relevant to this research: Regulation 15 provides the fee payable for the renewal of registration a CMO in Kenya; Regulation 16 requires CMOs to file annual reports and audited accounts and Regulation 17 and 18 that set procedure for making applications for compensation or payment of royalties.

## **3.2. Kenya's response to the various digital problems that CMOs face**

This section discusses the effect of digital exploitation of music work in Kenya as mentioned in chapter one, Kenya's legislative response to the challenges of managing music works in the digital environment and how these challenges assert the role of CMOs in the digital sphere. It also responds to these digital challenges and explains the best responses to make the system of

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<sup>190</sup> The rights to make, sell, distribute, import for commercial gain. Copyright infringement in this regard is also inferred when a person has in his possession an infringing copy unless they can prove that they had no reasonable ground for believing that the rights of the performer shall be infringed; if found guilty of infringement in section 38(1), such a person shall be liable upon conviction to 'a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.'

<sup>191</sup> Section 41(4)(d) of KCA guilty person is liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months or to both.

<sup>192</sup> Section 3 & 5 of KCA.

<sup>193</sup> Section 42 of KCA; section 14 of the Kenya Police Act empowers the Police to enforce any law.

<sup>194</sup> According to chapter 10 of the Constitution of Kenya the main function of the judiciary is to interpret laws.

<sup>195</sup> Section 2 of KCA defines an inspector to be such a person appointed as per Section 39 of the Copyright Act; Section 39 of the Copyright Act empowers KECOBO to appoint copyright inspectors to assist in enforcing copyright; Enforcement Bulletin, Kenya Copyright Board <http://www.copyright.go.ke/copyright-enforcement.html>.

<sup>196</sup> Ibid.

<sup>197</sup> Section 49 empowers the Attorney General to make regulations for carrying out provisions of the Act.



collective management of music work efficient. In doing so the dissertation discusses the regulation of the following aspects in the current copyright system:

- i. fair dealing provisions in the copyright act and their role in enabling or inhibiting authorized file sharing, defining the scope of exclusive rights , enabling or inhibiting the creation of transformative and derivative works;
- ii. file sharing of music works;
- iii. determining the scope of exclusive rights attached to music work: right of reproduction, the right of distribution and the right of communication to the public;
- iv. regulation of transformative and derivative works in the digital era;
- v. public acceptance of collective management and copyright in the digital era.

### **3.2.1. Fair dealing provisions affecting collective management of music works**

Fair dealing provisions are qualifications to a copyright holder's exclusivity and are also referred to as fair dealing exceptions.<sup>198</sup> They allow users to utilize portions of copyrighted works without seeking license or permission or paying.<sup>199</sup> These provisions are important in determining rules of dissemination and creation of music works in the online environment.<sup>200</sup> They also determine authorized and unauthorized use of music works thereby touching on the mandate of CMOs. Consequently the provisions determine the scope of CMO duties in the digital sphere which are centered on facilitating authorized use of **copyright** protected works.

The scope of exclusive rights is also pegged on fair dealing provisions since they limit the right to exclude use in file sharing activities, creation of transformative and derivative works. Fair dealing also affects online enforcement of copyright by CMOs by determining when liability for infringement may be imposed and may be used as defense against liability for infringement. The holding in *Sony Corporation of America v Universal City Studios Incorporation*<sup>201</sup> is a clear indication of when these provisions may be invoked as a defense for copyright infringement. This section discusses the fair dealing exceptions in the Copyright Act,

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<sup>198</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*. [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.).

<sup>199</sup> *Ibid.*

<sup>200</sup> Burk, Dan L. and Julie E. Cohen. "Fair use infrastructure for rights management systems." *Harv. JL Tech* 15 (2001): 41.

<sup>201</sup> 464 U.S. 417 (1984) by claiming that infringement is capable of a substantial non infringing use.

their effectiveness in determining what is fair in the context of online use of music works and effectiveness in facilitating collective management.

The fair dealing exceptions in section 26 of the Copyright Act include acts of scientific research, private use, criticism or review, or reporting current events provided that the source is acknowledged.<sup>202</sup> Section 26 of the Copyright Act was amended in 1995 to include the provision requiring acknowledgment of the source while fair dealing with a protected work. These provisions are broad enough to cover infringements in the digital sphere. However, the researcher submits that they were drafted for infringements in the analogue environment and it is difficult to apply these provisions to digital uses such as transformative uses and P2P file sharing unless the uses are directly related to scientific research, criticism or reporting current events.<sup>203</sup> The private use provision presents a grey area in its interpretation in the digital environment. Music works may be disseminated via file sharing systems where work is downloaded for private use and posted in a file sharing site which is accessible to many people who might use the works for non-commercial purposes. Lack of explicit provisions addressing digital uses negatively impacts on the ability of CMOs to manage music works that are used in the realm of these activities that can fit in the description of being infringing and fair dealing.

The distinctions between private and public use have become blurred and the same copy that is legal to make for personal use becomes an infringement when made available to others.<sup>204</sup> Collection of royalties by CMOs is subject to fair dealing provision as discussed in the Canadian case of *Society of Composers, Authors and Music Publishers v Bell Canada*. It was held that downloading previews of music clips was fair dealing with the work.<sup>205</sup> The court decided that previews for personal interest were considered to fall in the category of research exception for copyright infringements.<sup>206</sup>

Article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement make provision for a three step test to be considered before limiting exclusive rights. This test is applied by member states when testing whether limitation of exclusive rights is considered fair

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<sup>202</sup> Section 26 (1) (a) of KCA.

<sup>203</sup> Ibid.

<sup>204</sup> Gervais op cit (n122) at 19.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

and thus permissible. These provisions allow member countries like Kenya to permit reproduction of copyright protected works so long the limitation of the right does not conflict with normal exploitation of the work and does not prejudice the legitimate interests of an owner. South Africa<sup>207</sup> and Nigeria<sup>208</sup> have utilized these provisions to determine the scope of the right of reproduction by proposing the expansion of their fair dealing provisions to allow reproduction for making transient copies.<sup>209</sup>

The researcher is of the view that this test should be used in tandem with a fairness test provided in copyright legislation to assist CMOs in determining whether an unauthorized use is covered by a fair dealing provision. The Copyright Act lacks a definition of fairness.<sup>210</sup> The Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*<sup>211</sup> (the CCK case), interpreted fairness by determining whether rebroadcast by digital broadcasters of free to air broadcasts owned by analogue broadcasters constituted fair dealing as per section 26. The court developed a test for fairness to be used by affirming the six factor test developed in the Canadian case of *CCH Canadian Ltd. v Law Society of Upper Canada*, (the CCH case)<sup>212</sup> which considered the purpose of the dealing; character of the dealing; amount of dealing; alternatives to dealing; nature of the work and effect of the dealing on the work.<sup>213</sup>

Kenya should utilize provisions in the Berne Convention and the TRIPS Agreement to expand the fair dealing exceptions to reflect digital uses. The Copyright Act should also provide a fairness test and since it has been litigated on, the Act should adopt the test that was used in the CCK case. This will define the scope of CMO duties.

The fair dealing consideration in this section forms part of the overall analysis in discussing the other four digital concerns: file sharing, defining the scope of exclusive rights and enabling transformative uses of music works in the online environment.

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<sup>207</sup> Copyright Bill 2017.

<sup>208</sup> Draft Copyright Bill 2015.

<sup>209</sup> Reproductions that are a technical necessity for use of copyright online in activities such as browsing.

<sup>210</sup> *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

<sup>211</sup> [2014] eKLR.

<sup>212</sup> [2004] 1 SCR 339, 2004 SCC 13.

<sup>213</sup> Ibid.

### 3.2.2. File sharing of music works and collective management

Data transmission in the online environment is mainly facilitated by file sharing systems such as P2P systems and streaming.<sup>214</sup> Although P2P file sharing has in large parts been replaced by streaming, Kenya has not yet embraced a clear policy on P2P file sharing. This is why this dissertation places more emphasis on file sharing and its effect on collective management of music works. The transfer of music work through P2P file sharing systems began with a centralized system called Napster.<sup>215</sup> "File sharing relies on computers forming networks to allow the transfer of data from computers in the same network, while P2P file sharing refers to file sharing between computers that can request information and fulfill requests by establishing multimedia connection networks."<sup>216</sup> This is done through downloading<sup>217</sup> and uploading the works<sup>218</sup> on P2P site for access by other users.<sup>219</sup> P2P systems play a major role in enabling creation, production, and distribution of music works in the online environment. With P2P file sharing the distribution of music works is no longer confined to small groups of people.<sup>220</sup> It is predicted that the music industry will not be able to stop file sharing since it has become a social norm for distribution of content in the internet.<sup>221</sup>

File sharing constitutes online use of music works. To determine whether this type of use may be managed by CMOs a determination as to whether it is covered in the fair dealing exceptions has to be made. Since the fair dealing provisions in the Copyright Act lack an exception for file sharing, this dissertation discusses the role of CMOs in enforcing music works disseminated through P2P systems and legitimizing file sharing so as to create a new avenue for royalty collection.

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<sup>214</sup> Rheingold, Howard. *Smart mobs: The next social revolution*. Basic books, 2007. as quoted in Gervais, Daniel J. "The Price of Social Norms: Towards a Liability Regime for File-Sharing." *J. Intell. Prop. L.* 12 (2004): 39.

<sup>215</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

<sup>216</sup> Oberholzer-Gee, F., and K. Strumpf. "File-sharing and copyright (Working Paper No. 09-132)." Retrieved from Harvard Business School website: <http://www.hbs.edu/research/pdf/09-132.pdf> (2009).; Schollmeier, Rüdiger. "A definition of peer-to-peer networking for the classification of peer-to-peer architectures and applications." *Peer-to-Peer Computing, 2001. Proceedings. First International Conference on. IEEE, 2001*.

<sup>217</sup> Downloads consist reproductions of works in the digital environment.

<sup>218</sup> Uploads are considered to be distributions of work in the digital environment.

<sup>219</sup> Strowel, Alain, ed. *Peer-to-peer file sharing and secondary liability in Copyright law*. Edward Elgar Publishing, 2009 as quoted in Séverine, and Colin op cit (n14) at 4.

<sup>220</sup> Dean, O., and A. Dyer. "Introduction to Intellectual Property Law." (2014).

<sup>221</sup> Gervais and Maurushatop cit (n26) at 5.

### **A. Enforcement of music work copyright disseminated through P2P systems**

One of the reasons in support of collective management lies in the difficulty to individually police copyrights.<sup>222</sup> Right holders assign their rights to CMOs for the protection of their rights so as to reduce costs involved<sup>223</sup> in monitoring, detecting, remedying infringements and enforcement of copyright.<sup>224</sup> It follows that CMOs have the duty to warn users against unauthorized use of copyright and the right to litigate on behalf of their members in case of online infringement.<sup>225</sup> For this reason right holders depend on CMOs' specialized protection tactics to get royalties for online use of their music works.<sup>226</sup>

The Copyright Act does not acknowledge the enforcement role of CMOs. It vests this role on KECOBO and part of the national police assigned to be copyright inspectors. This coupled with lack of laws regulating intermediary liability for online copyright infringement is a major setback for the enforcement of copyright by CMOs in Kenya. For Kenyan CMOs to enforce copyright in the online environment they require laws that recognize them as enforcement agencies, create liability for online infringement and facilitate enforcement through intermediaries such as Internet Service Providers (ISPs).<sup>227</sup>

Copyright infringement via P2P networks may be prevented by legal provisions imposing individual liability or intermediary liability for the infringement. The South African case (the Four Corner's case)<sup>228</sup> is a good example where a person was convicted for online infringement of copyright. The accused faced criminal charges for posting a local movie (Four Corner's) on Pirate Bay to distribute the movie online.<sup>229</sup> He was sentenced to a three year suspended sentence and a fine of 3000 ZAR or a six month suspended sentence.<sup>230</sup> This sentence has been criticized for being harsh as and not solving online piracy.<sup>231</sup> Going after individuals for online infringement may pose a reputational risk for right holders and more often indicates a slim

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<sup>222</sup> United States Performing Rights Society emerged for this reason; Mihály op cit (n15) at 4.

<sup>223</sup> Economic theory of collective management.

<sup>224</sup> Ibid.

<sup>225</sup> Bhat, P. Ishwara. "The role of collective bodies in protection of intellectual property rights in India." (2009).

<sup>226</sup> Ibid.

<sup>227</sup> Those who make file sharing possible.

<sup>228</sup> *R v Norton*; the Four Corners case (Unreported).

<sup>229</sup> Charges brought by the provisions of section 27 of South Africa's Copyright Act.

<sup>230</sup> IP Unit University of Cape Town Intellectual Property Unit Our views regarding the "Four Corners" piracy case sentence 2014 ; <http://www.iplaw.uct.ac.za/news/our-views-regarding-%E2%80%9Cfour-corners%E2%80%9D-piracy-case-sentence>.

<sup>231</sup> Ibid.

chance of recovery.<sup>232</sup> Additionally internet users are often anonymous and can only be detected through the ISPs they subscribe to. For this reason, the dissertation submits that imposing liability through intermediaries will be the best way to assist CMOs in enforcing copyright works disseminated through P2P networks.

The widespread use of the internet and the increasing tendency to link electronic devices<sup>233</sup> to the global network makes it difficult to keep music works off the internet.<sup>234</sup> A combination of technology and law such as the use of ISPs and IAPs to block pirated content may assist right holders to keep their protected works off major servers.<sup>235</sup> Intermediary liability for online copyright infringements will be discussed by analyzing the role of ISPs in facilitating these infringements. ISP liability sprouts from the legal liability for engaging in online content distribution through managing or allowing P2P through their networks,<sup>236</sup> ISPs providing internet infrastructure that facilitate the use of P2P networks.<sup>237</sup> In this concept ISPs are held liable for the infringing acts of their subscribers for having the ability to control information that passes through their networks. Questions of liability arise when they facilitate the distribution of unauthorized copyright work. Intermediary liability for online copyright infringement has grown on basis of jurisprudence from decision in USA as a means of limiting the growth of P2P networks.<sup>238</sup>

- a. contributory infringement as developed in *Sony Corporation of America v Universal City Studios Incorporation*<sup>239</sup> (Betamax case);
- b. vicarious liability as developed in *A&M Records, Inc. v. Napster, Inc.* (Napster case)<sup>240</sup>

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<sup>232</sup> Jooste, C., and Sadulla Karijer Intellectual Property Law in the Digital Environment (EIP Law) in Dean op cit (n220) at 34.

<sup>233</sup> Such as Personal Digital Appliances (PDAs) and soon television sets and stereo receivers.

<sup>234</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>235</sup> Requesting ISPs and IAPs to block access to websites that make it possible to access pirated music.

<sup>236</sup> The concept of vicarious liability for third party liability of online infringements as espoused in *A&M Records, Inc. v. Napster, Inc* 39 F.3d 1004 (2001).

<sup>237</sup> OECD The Role of Intermediaries in advancing Public Policy Objectives;

<http://www.oecd.org/sti/ieconomy/theroleofinternetintermediariesinadvancingpublicpolicyobjectives.htm>.

<sup>238</sup> *A&M Records Inc. v Napster Inc. (the Napster Case)* 239 F.3d 1004 (2001); *Sony v. Universal Studios (The Betamax case)* 464 U.S. 417,442 (1983); *Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd* 380 F.3d 1154, 1162 (9th Cir. 2004).

<sup>239</sup> 464 U.S. 417 (1984); in Contributory infringement a third party is liable for the infringement of another if he has knowledge of the infringement or material contribution to the infringement so long as the infringement is not capable of a substantial non infringing use.

- c. inducement theory as developed in *Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>241</sup> (Grokster case)

From the above cases, unauthorized downloads and uploads of music work in P2P networks are considered infringing and should be detected and stopped by CMOs.<sup>242</sup>

In Kenya internet intermediaries are licensed in accordance with section 24 and 25 of the Kenya Information and Communication Act.<sup>243</sup> In 2009, the Communications Commission of Kenya now the Communications Authority of Kenya (CA of Kenya), categorized internet intermediaries into three categories:

- a. “Network Facilities Provider (NFP): owning and operating any form of communications infrastructure (based on satellite, terrestrial, mobile or fixed);
- b. Applications Service Provider (ASP): providing all forms of services to end users using the network services of a facilities provider;
- c. Contents Services Provider (CSP): providing contents services such as broadcast (TV & Radio) material, and other information services and data processing services.”<sup>244</sup>

Kenya lacks legislation that specifically regulates ISP liability for copyright infringement.<sup>245</sup> Continued existence of infringing material is widely described in the ambit of copyright infringement as provided in the Copyright Act.<sup>246</sup> Even without enabling provisions some ISPs voluntarily cooperate with copyright enforcement agencies through monitoring and reporting infringing activities of their subscribers. ISPs also contract with subscribers to enforce

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<sup>240</sup> 239 F.3d 1004 (2001); Vicarious infringement is inferred when a third party has the ability to control an infringing user or has a direct financial benefit from the infringement or has actual knowledge of the infringement.

<sup>241</sup> 380 F.3d 1154, 1162 (9th Cir. 2004); according to the inducement theory a third party is liable for the infringements of another if they take an affirmative step to encourage the infringement.

<sup>242</sup> Séverine, and Colin op cit (n14) at 4.

<sup>243</sup> Kenya and Information Act, 1998.

<sup>244</sup> Munyua, Alice, et al. "Intermediary Liability in Kenya."

<sup>245</sup> This liability is inferred from general provisions regulating civil and criminal liability. These include: the National Cohesion and Integration Act 12 of 2008; Section 12, 14, 19 of the Sexual Offences Act of 2009, Section 194 of the Penal Code (Chapter 63 Laws of Kenya); Section 11(1) and 11(2) of the Consumer Protection Act by providing a safe harbour provision for ISPs for advertising prohibited gaming sites.

<sup>246</sup> Section 28, 35, 36, 38, 43 of KCA.

copyright. This is done through user service agreements which outlaw unlawful conduct by users and indicate ISPs readiness to cooperate with enforcement agencies when infringing activities are detected through their networks. There have been attempts to provide for intermediary liability in Kenya. This is evident by the unsuccessful proposed changes in law by the Electronic Transactions Bill of 2007, the Consumer Protection Bill of 2011 and the Freedom of information Bill of 2012. In 2015, KECOBO and the Communication Authority of Kenya made a public proposal to hold Internet Service Providers liable<sup>247</sup> after the *Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors* petition.<sup>248</sup>

The Copyright Act<sup>249</sup> imposes direct liability on users for their infringing activities but does not regulate on the liability for ISPs. No decided case in Kenya has dealt with the realm of P2P file sharing and third party liability for file sharing using P2P systems. Nevertheless, the petition in *Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors*<sup>250</sup> seeks injunctive orders to compel ISPs in Kenya to block copyright infringing materials that pass through their networks.<sup>251</sup> This case also seeks declaratory orders to clarify the State's Constitutional obligations in protecting intellectual property such as copyright from online infringement.<sup>252</sup> Although this case is still in court, the decision is anticipated to predict how Kenya will regulate intermediary liability for online copyright infringement.

The Copyright Act should have a provision listing CMOs as one of the enforcement agencies in the Act since CMOs are instrumental in enforcing copyright based on their role in monitoring uses of their respective members even in the digital era. This dissertation submits that KECOBO should push for the enactment of legislation on ISP liability for online copyright infringement through the Copyright Act or enact a different legislation that deals with matters of electronic transactions to that effect. Amendments to Kenya's copyright laws should also provide safe harbors for ISPs as a policy compromise to allow ISPs to continue providing infrastructure for content flow. Safe harbor provisions protect ISPs from liability arising from the infringing acts

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<sup>247</sup> Proposed Amendments to provide Web Blocking Measures in cases of Copyright Infringements Online in Kenya, 2016 Draft Zero <https://ipkenya.files.wordpress.com/2016/01/proposed-isp-measures.pdf>.

<sup>248</sup> Mihály op cit (n15) at 4.

<sup>249</sup> KCA.

<sup>250</sup> Mihály op cit (n15) at 4.

<sup>251</sup> Ibid.

<sup>252</sup> Article 11(2) (c) of the Constitution of Kenya; <https://ipkenya.wordpress.com/2015/09/08/government-invites-public-views-on-liability-of-online-intermediaries-for-copyright-infringement/#more-3506>.



of their subscribers for the mere reason of providing infrastructure that facilitates infringement. Examples of safe harbor provisions are those in Chapter XI of South Africa's ECT Act where ISPs are protected for transmitting, temporary storage of copyrighted works or linking users to protected works subject to prescribed conditions.

## **B. The role of CMOs in legitimizing file sharing**

File sharing may be used for fair dealing or non-infringing purposes like issuing a license for the use copyright works in place of an offline purchase of music works in Compact Discs (CDs).<sup>253</sup> Online users may use file sharing systems for purposes of sampling copyright protected works while considering whether to purchase CDs or get license to use the works.<sup>254</sup> It is also utilized to get access to protected content that is no longer available or is cumbersome to get offline or the right holder allows for such use.<sup>255</sup>

In the Canadian case of *Society of Composers, Authors and Music Publishers v Bell Canada*<sup>256</sup> there was a determination on the royalties payable for the sale of downloads through online music sites. The copyright board held that the society was entitled to collect royalties for downloading but not for previewing since previews were considered to be fair dealing with the works. The Board interpreted the term 'for research purposes' in the fair dealing exceptions to have a wide meaning including research to consider whether you shall buy provided it is for personal interest. From this holding, it may be inferred that file sharing for purposes of preview or research is not subject to royalties that are collected by CMOs.

Despite the fact that some file sharing systems are capable of substantial non-infringing uses the courts have held developers of P2P systems liable for enabling infringement through these networks.<sup>257</sup> From USA jurisprudence<sup>258</sup> on intermediary liability for P2P file sharing, there is an implicit assumption by the courts that "all private copying of copyrighted works by people who

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<sup>253</sup> Lawrence Lessig, *Free Culture* 300 (2004).

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> 2012 SCC 36.

<sup>257</sup> *Betamax case, Grokster case and Napster case.*

<sup>258</sup> *Ibid.*

use file sharing software cannot be classified as fair use.”<sup>259</sup> In Kenya it is difficult to distinguish between legitimate and illegitimate file sharing since there is no legislation or case law that specifically addresses P2P sharing systems.

To determine whether P2P file sharing is legitimate and in the ambit of collective management, the next paragraph discusses whether the Copyright Act includes file sharing in the fair dealing exceptions. The fair dealing provisions in section 26 of the copyright Act are used to determine when CMOs may license use of music work copyright through P2P networks. Thereafter, the dissertation recommends the best system of licensing that should be adopted by CMOs in Kenya for this type of licensing. Chapter two of this dissertation established that one of the functions of CMOs is licensing the use of music repertoire transferred to them by the respective right holders. P2P file sharing expands the role of CMOs by enabling authorization for use through licensing. This dissertation embraces the idea of legitimizing P2P sharing by maximizing authorized use of music works as opposed to minimizing unauthorized use of P2P systems by users. This will be done by suggesting ways to license the upload of music works through P2P systems.<sup>260</sup>

If P2P networks are used for downloading or uploading copyright works for the fair dealing purposes mentioned in section 26, then such file sharing may qualify as an exemption to infringement or licensing by CMOs. Since it is difficult to tell apart commercial and non commercial file sharing; this part of the dissertation discusses commercial and noncommercial file sharing that is considered infringing and without authorization from the respective right holders.<sup>261</sup>

From the readings of section 26 the researcher is inclined to hold the view that CMOs may license dissemination of music works through P2P systems. Even so, CMOs may only carry out their licensing function if they are able to differentiate between file sharing for private or commercial use in Kenya. This is currently impossible since the current fair dealing exceptions were crafted for copyright uses in the analogue era which excluded P2P file sharing.

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<sup>259</sup> Pessach, Guy. "An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, and Next Generations' Questions." *Vand. J. Transnat'l L.* 40 (2007): 87.

<sup>260</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>261</sup> Séverine and Colin op cit (n14) at 4.

The current Copyright Act should be amended to specifically define what constitutes private use in the digital environment. This will assist in determining when CMOs may license use of music work copyright in P2P systems. After determining that use of music work is licensable, then CMOs in Kenya will be at a better position to explore different licensing systems for authorizing use of music work in P2P systems as discussed in the next paragraphs.

Gervais suggests collective management of copyright as one<sup>262</sup> of the means of legitimizing file sharing so long as it is not covered by the fair dealing exceptions.<sup>263</sup> He is of the opinion that individual management of copyright is not effective to ensure right holders receive royalty for use when their work is disseminated through file sharing networks.<sup>264</sup> File sharing systems may be legitimized through: compulsory licensing, licenses between CMOs and ISPs and license between CMOs and users.<sup>265</sup> The first system of compulsory licensing is proposed by Neil Netanel.<sup>266</sup> In this system compulsory licensing is imposed by statute and copyright holders receive compensation through a levy paid by providers of products and services<sup>267</sup> whose value has been increased through use by P2P file sharing systems. Compulsory licensing for P2P copyright uses has been criticized for passing costs to all subscribers and customers of products and services even those that are not engaged in file sharing activities. It will also be ineffective in Berne Convention member countries since the convention only allows compulsory licensing in limited circumstances.<sup>268</sup> No country has introduced this system as yet.

The second system of legitimizing file sharing is through license agreements between CMOs and ISPs. These systems propose CMOs to conclude licensing contracts on behalf of their members while ISPs enter into the contract for the benefit of their internet subscribers. In these licensing agreements, ISPs contract to pay remuneration for the use of copyright in P2P systems through their internet network then pass this burden of compensation to their users who want to

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<sup>262</sup> Licensing may be done by ISPs, CMOs, technology companies or a combination of all; Gervais op cit (209) at 33.

<sup>263</sup> Ibid.

<sup>264</sup> Gervais op cit (n43) at 7; Séverine and Colin op cit (n14) at 4.

<sup>265</sup> Mihály op cit (n167) at 27; Séverine and Colin op cit (n14) at 4.

<sup>266</sup> Netanel, Neil Weinstock. "Impose a noncommercial use levy to allow free peer-to-peer file sharing." *Harv. JL & Tech.* 17 (2003): 1.

<sup>267</sup> Séverine and Colin op cit (n14) at 4; Internet access, P2P software and electronic devices used to store, copy and listen to files downloaded from P2P networks.

<sup>268</sup> From the reading of the three step test for limiting exclusive rights in Article 9(2) of the Berne Convention: compulsory licensing may be permitted in a country if it does not conflict the normal exploitation of the work or unreasonably prejudice the rights of the author.; Séverine and Colin op cit (n14) at 4.

benefit from this licensing. Thereafter, the CMOs distribute this remuneration to their respective members. Belgium has tried to introduce a bill that proposed such a system where ISPs would compensate right holders for use of their works in file sharing systems but it failed due to limited representation.<sup>269</sup>

In the third system of licensing between CMOs and P2P users, CMOs negotiate with users' representatives to determine the license fees and enter into direct contracts with P2P users.<sup>270</sup> In essence this makes the ISPs intermediaries to the license agreements. The license binds P2P users to pay compensation for use of copyright protected works in their networks. This system suggests that CMOs will have to work closely with ISPs to monitor their subscribers' activities of uploading and downloading IP protected works.<sup>271</sup>

This dissertation recommends the third system for Kenya in legitimizing the noncommercial use of music work copyright in P2P systems. Licensing between CMOs and P2P users involves CMOs in the process (unlike the compulsory licensing system) and recognizes the intermediary role of ISPs laid in the ability to monitor infringing acts through their networks (unlike the second system that places ISPs in the licensing system as a party to the contract). Consequently, to facilitate collective management in this system there must be a consensus among the interested parties to designate one CMO as a one stop shop for licensing use of music work in P2P networks.<sup>272</sup> This is because a single CMO may not hold all the rights to works that may be shared through P2P networks or even represent all right holders. The designated CMO will then redistribute the royalties and fee collected to other CMOs which will distribute the fee to the respective right holders. This mode of collection is adopted in some European countries to allow for photocopying and private copying.<sup>273</sup>

Relying exclusively on court litigation to curb copyright infringements through P2P file sharing is the reason behind determinations that P2P sharing is illegal.<sup>274</sup> A move to amend the

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<sup>269</sup> Ibid.

<sup>270</sup> Aigrain, Philippe. *Internet & création: comment reconnaître les échanges hors-marché sur internet en finançant et rémunérant la création?* In libro veritas, 2008.

<sup>271</sup> Ibid.

<sup>272</sup> Such as authors, performers, film producers and music producers.

<sup>273</sup> Séverine and Colin op cit (n14) at 4.

<sup>274</sup> American jurisprudence on liability for online file sharing; Renda, Andrea, et al. "The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society. CEPS Special Report No. 120, 19 November 2015." (2015).

Kenya's copyright laws to legitimize online file sharing through the CMO system of licensing<sup>275</sup> will increase dissemination of music works and also create another royalty creation avenue for right holders and expanding the role of CMOs making them even more relevant in this digital era. The dissertation submits that despite technologies such as file sharing, CMOs still find their place in the management of music works.

### **3.2.3. Determining the scope of the exclusive rights attached to music works in the Copyright Act**

The Copyright Act gives right holders the exclusive rights to reproduce, distribute and communicate their works to the public.<sup>276</sup> The wording in legislation and judicial interpretation of the rights is important for CMOs tasked with the duty to ensure authorized use of music works.<sup>277</sup> In the digital environment a download can be analogized into one or more of the exclusive rights. Where legislation lacks explicit provisions explaining the scope of the rights it is difficult for CMOs to enforce the rights on behalf of their members since they cannot determine whether rights have been infringed and which of the rights is infringed.

CMOs can no longer rely on the traditional understanding of the exclusive rights in the Copyright Act when performing their functions because of the shift in creating, distributing, consuming and incentivizing the creation of copyright works.<sup>278</sup> To facilitate collective management of these rights, Kenyan law needs to reflect these changes by defining the scope of these rights in the digital environment.

#### **A. The right of reproduction**

CMOs manage the reproduction of music works. In the digital environment reproductions are a technical necessity for dealing with copyright works in by browsing, caches, using and transmitting works over networks.<sup>279</sup> This makes the interpretation of the right of reproduction an integral when discussing the role of CMOs in managing of music works in the digital environment.

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<sup>275</sup> Licensing between CMOs and P2P users.

<sup>276</sup> Section 26 & 28 of KCA.

<sup>277</sup> Segal op cit (n67) at 10.

<sup>278</sup> Ibid; Renda op cit (n274) at 42.

<sup>279</sup> Ibid.

The Berne Convention accords the right of reproduction to authors in article 9.<sup>280</sup> This right is replicated in the Copyright Act with reference to music works in section 26 and section 28. Article 9(1) of the Berne Convention on reproduction has been widely interpreted to include the storage of copyright in digital form in an electronic medium.<sup>281</sup> This section discusses the interpretation of the exclusive right of reproduction in the Copyright Act and whether the Act encompasses the different forms of reproduction and prevention of infringing reproductions in the online environment. To this effect the dissertation will discuss:

- a) temporary/transient/ incidental reproductions
- b) what constitutes commercial or private use and the private copying exception
- c) technological restrictions to prevent unauthorized use of music works

#### **a) Temporary/transient/incidental reproductions**

The reproduction of copyright work in digital form is not confined to reproductions in material or permanent form whereas downloads are outright reproductions of protected works, the nature of caches is questionable. In the absence of a fair dealing exception temporary copies of copyright works may be considered to be infringement.<sup>282</sup> A cache is a temporary electronic copy.<sup>283</sup> An example of this is the temporary or cache copies made when web browsing. Every time a person browses a website the data requested comes from the host server where they are stored, then cache copies are made on the servers of the ISP that a user subscribes to.<sup>284</sup> When an internet user listens to music work online, a copy of the work is made on the computer temporarily.<sup>285</sup> This means that each time a user downloads music work content for viewing and listening, they are engaged in acts of reproduction which may constitute infringement if they are not authorized by the respective right holders.<sup>286</sup> It also means that the ISPs are liable of contributory infringement for providing the infrastructure that facilitates the infringement.<sup>287</sup> For CMOs to manage reproduction rights in the digital environment they require enabling provisions

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<sup>280</sup> Article 9 of the Berne Convention.

<sup>281</sup> Ginsburg, Jane C. "Essay: From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law." *J. Copyright Soc'y USA* 50 (2002): 113.

<sup>282</sup> Jooste and Karijer op cit (232) at 36.

<sup>283</sup> Section 1 of the Electronic Communications and Transactions Act 25 of 2002, as amended by the Consumer Protection Act 68 of 2008..

<sup>284</sup> Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

that differentiate between justifiable reproduction of works in the online environment and outright infringements.

This section discusses Kenya's position with regard to temporary reproductions in the online environment and the protection of ISPs from liability that arise for these reproductions. Section 2(1) of the Copyright Act defines reproduction to be a copy or copies of work including temporary and permanent copies in any material form. The fair dealing exceptions in section 26(a) do not provide for temporary reproductions or adaptations.<sup>288</sup> The definition makes the cache copies an infringement despite being part of the process required for viewing copyright works online and having no economic significance to the user or the ISP.<sup>289</sup> This makes it difficult for the operation of CMOs in the digital era, as this would mean that they may license the making of cache copies. Kenyan legislation should reflect the realities of viewing music works in the online. The Act as it is now requires each user to get permission for the private non-economic viewing of works; in essence this makes most internet users in Kenya copyright infringers.

South Africa's Copyright Amendment Bill of 2017<sup>290</sup> and the Nigerian Draft Copyright Bill<sup>291</sup> propose allowing temporary reproductions and adaptations of works to enable the transmission of works in the online environment. The definition of reproduction in Kenya's Copyright Act should be amended to allow for transmission of copyright works online so long as it has no economic significance. Temporary reproductions may also be allowed by being incorporated in the fair dealing exceptions for music works.

In most cases copyright owners go after ISPs for the infringing acts of their subscribers because they are financially capable and fewer than the individual infringers.<sup>292</sup> This makes ISPs in Kenya the biggest victims of liability for temporary reproductions. Currently, there are no safe harbor provisions to protect ISPs from liability arising from caching. In 2015 KECOBO and the CA of Kenya proposed amendments to the Copyright Act to provide safe harbor protection

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<sup>288</sup> Section 26(a) of KCA.

<sup>289</sup> Article 5 of the EU Copyright Directive; Section 13 A of the Copyright Amendment Bill, 2017.

<sup>290</sup> Section 13 A of the Copyright Amendment Bill, 2017.

<sup>291</sup> Section 20 n of the Nigerian Draft Copyright Bill, 2015.

<sup>292</sup> Dean op cit (n220) at 34.

for ISPs for making cache copies.<sup>293</sup> In countries like South Africa the safe harbor provisions are provided in a different legislation.<sup>294</sup> This dissertation proposes that Kenya should amend the Copyright Act to reflect the proposals by KECOBO and the CA of Kenya so as to expand the role of CMOs in managing reproduction rights in the digital environment.

#### **b) Private copying exception**

The distinction between private and commercial use is important in determining whether collective management is permissible. This is because private use is included in the fair dealing exceptions thereby limiting collective management of exclusive rights.<sup>295</sup> It is difficult to tell apart commercial use from private use in the online environment due to the ease in distributing the copies for free.<sup>296</sup> The distinction was fairly easy in the analogue era since distribution relied on physical means.<sup>297</sup>

The Copyright Act lacks a definition of the term private use. Nevertheless it makes provision for a private copying exception with respect to sound recordings in section 28(3). The making of a single copy is considered fair dealing provided the right holder receives royalty attached to a blank tape levy. The Copyright (Amendment) Act of 2014 amended section 28(5) of the copyright Act<sup>298</sup> giving KECOBO the mandate to collect the blank tape levy and distribute it to the relevant CMOs. This section expands the role of CMOs in managing sound recordings as one group of music works but leaves out musical works. Despite the existence of this provision<sup>299</sup> no CMO has been registered to collect royalties for the blank tape levy.<sup>300</sup>

The private copying exception in the Copyright Act is afforded to sound recordings but not to musical works. The exception in section 28(3) should be extended to musical works so as to cover the music works in this dissertation. This would assist in clarifying what constitutes

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<sup>293</sup> Proposed Amendments to provide Web Blocking Measures in cases of Copyright Infringements Online in Kenya, 2016 Draft Zero <https://ipkenya.files.wordpress.com/2016/01/proposed-isp-measures.pdf>.

<sup>294</sup> Section 74 of the Electronic Communications and Transactions Act.

<sup>295</sup> Section 26 of the Copyright Act.

<sup>296</sup> Karapapa, Stavroula. *Private copying*. Routledge, 2012. Ouma, Marisella N. "Optimal Enforcement of Music Copyright in Sub-Saharan Africa: Reality or a Myth?." *The Journal of World Intellectual Property* 9.5 (2006): 592-627.

<sup>297</sup> Section 26 and 28 of the KCA; Ibid.

<sup>298</sup> 2001.

<sup>299</sup> Section 28(5) of KCA.

<sup>300</sup> <https://ipkenya.wordpress.com/tag/private-copying-levy/>.



private use for reproduction purposes and create certainty in terms of the types of reproductions that can be managed by CMOs in the digital environment.

### **c) TPMs**

Copies made using digital technologies are described as being “physically and formally chameleon” making it difficult for CMOs to tell apart an original copy from a reproduction.<sup>301</sup> It is even more difficult to differentiate an authorized copy from an unauthorized one.<sup>302</sup> CMOs should use TPMs such as DRMs to assist them in performance of their enforcement function in the digital environment. DRMs present a digital means of preventing illegal utilization of digital music works by monitoring use and ensuring only authorized users may access protected works.<sup>303</sup> They also facilitate the use of digital licenses by using encryption or password protection and the “digital envelope”<sup>304</sup> forcing unauthorized users to seek permission to view or use digital content.

The Copyright Act through its anti-circumvention provision in section 35(3) prohibits the manufacture, distribution and importation of circumvention tools. It also outlaws the distribution or broadcast of protected copies whose electronic rights management has been removed.<sup>305</sup> The researcher submits that the Act provides digital protection of music works against unauthorized reproductions by providing adequate protection for TPMs. Additionally if TPMs are utilized by CMOs they will expand their role in managing the right of reproduction in online platforms.

### **B. The right of communication to the public**

The right of communication to the public is defined as the right to transmit work to persons not belonging to a private group.<sup>306</sup> This right is important in the digital environment with digital technologies and computers facilitating on demand and transborder dissemination of works and giving users the discretion to determine where and when they can access digital music

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<sup>301</sup> Davis, Douglas. "The work of art in the age of digital reproduction (an evolving thesis: 1991-1995)." *Leonardo* (1995): 381-386.

<sup>302</sup> Ibid.

<sup>303</sup> Zijian op cit (n66) at 10.

<sup>304</sup> The digital envelope covers the digital content and contains the terms and conditions of use.

<sup>305</sup> Section 35(3) of KCA.

<sup>306</sup> Section 2 of KCA; Rafiqi, Fareed Ahmad, and Iftikhar Hussian Bhat. "Copyright protection in digital environment: Emerging issues." *International Journal of Humanities and Social Science Invention* 2.4 (2013): 6-15.

works. The right is also important for CMOs since they manage access to works through licensing use.

Section 26 and 28 of the Copyright Act accord the right to communicate work to the public but do not define the scope of the right. Currently Kenyan courts have not defined the scope of the right for digital uses leading to reliance on interpretations from other jurisdictions. It is hoped that the determination in the *Bernsoft case* will give an interpretation of the right in finding whether ISPs are liable for facilitating communication of infringing works through provision of internet services.

Article 11(1) (ii) of the Berne Convention gives authors of musical works the right to authorize communication to the public of performance of their works. The protection of this right in the convention has been critiqued for being ambiguous leading to different interpretations regarding whether it regulates interactive communications like transmissions through computer networks such as P2P networks. This creates a challenge to CMOs where the provisions are interpreted to mean that right holders do not have the right to exclude others from communicating their music works through online systems.<sup>307</sup>

Article 8 of the WCT provides a broader definition of the right to cover online dissemination of copyright works. It defines the right to include the making available to the public in a way that allows people to access the works when and where they choose to. This provision in the WCT covers interactive communication networks and solves the ambiguity of interpretation of the right in the Berne Convention. The making available right<sup>308</sup> gives right to control access to music works that has been made available and is not dependent on whether users have accessed the work.<sup>309</sup> However, the WCT does not define the term “public” therefore not solving the challenge of blurred lines of differentiating between public and private use in the online environment as discussed in section A (ii) of Chapter 3.2.3.

According to the WCT indirect acts like providing links to the downloadable music works constitutes an infringement of the right if not covered in the fair dealing exceptions or licensed

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<sup>307</sup> WIPO, Basic Proposal for the Substantive Provisions of the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference (WIPO Basic Proposal) (WIPO DOC. CRNR/DC/ 4, August 1996).

<sup>308</sup> Article 8 of the WCT.

<sup>309</sup> section 2 of KCA; Ahmad and Bhat op cit (n306) at 47.

by the relevant CMO.<sup>310</sup> Section 3(1) of the Judicature Act lists common law as one of the sources of Kenyan law. The United Kingdom has not defined the scope of this right, but considers judgments of the European Court of Justice (ECJ) to be good law. In *Svensson and Others v Retriever Sverige*,<sup>311</sup> the ECJ determined an infringement of the right of communication in relation to the making available right with regard to news reporting. The court interpreted article 3(1) of the InfoSoc Directive and held that the provision of clickable links on websites without authorization of a copyright owner does not constitute communication to the public. The holding in this case stated that the right may be infringed if access is obtained upon circumvention of some restrictive measures; or when the work is communicated to a “new public” that a copyright holder had not intended to reach.

The conflicting opinions on infringement of the right of communication through indirect acts such as providing links to downloadable works, creates a challenge for Kenyan CMOs in determining the basis of enforcing this right. Kenya should ratify the WCT to determine the scope of the right of communication or table a Bill for the amendment of the Copyright Act like in South Africa and Nigeria and make provisions to include the making available right in the right of communication to the public. It may also use the determination that will be adopted in the *Bernsoft case*. The researcher is of the opinion that adopting the interpretation by the ECJ in *Svensson and Others v Retriever Sverige*<sup>312</sup> will strain online enforcement of the right thereby not recommended for expanding the role of CMOs.

### **C. The right of distribution**

Right holders have the right to distribute their works to the public by sale, rental, lease, hire, loan, importation or other similar arrangement.<sup>313</sup> When physical records of music works are distributed for the above purposes without authorization from the right holders or for fair dealing purposes it constitutes infringement of the right.<sup>314</sup> In the same way digital dissemination is considered distribution of music works and unauthorized dealings in the online environment are

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<sup>310</sup> Ibid.

<sup>311</sup> AB (C466/12).

<sup>312</sup> Ibid.

<sup>313</sup> Section 26 of KCA; <https://www.bitlaw.com/copyright/scope.html>.

<sup>314</sup> Kasunic, Robert. "Making Circumstantial Proof of Distribution Available." *Fordham Intell. Prop. Media & Ent. LJ* 18 (2007): 1145.

infringements. However from the provisions in the Copyright Act,<sup>315</sup> it is difficult to determine whether an electronic transmission that makes the work available online for distribution constitutes infringement of the right. For CMOs in Kenya to effectively manage this right they require a law that determines the scope of this right in the digital sphere.

Broadband connections in Kenya are becoming widespread increasing connectivity making it easier for users to create a huge and an uncontrollable market for digital music works.<sup>316</sup> Copyright holders of digital content can also offer their works for sale online through online stores such as Amazon.com or iTunes.<sup>317</sup> The sale of digital works differs from a contract of sale in that it is representative of completing a copyright license for reproduction of the work as per the terms defined in the license agreement.<sup>318</sup> The purchaser or user does not acquire property rights in the work since there is no transfer of ownership. The user only acquires a non-exclusive and non-transferable right. By this nature the digital distribution is viewed as a contract for provision of services unless otherwise stated in the license agreement. In essence the right of distribution remains exclusive to the copyright owner in the digital environment and may be managed by CMOs on behalf of their members.

The petitioners in the *Bernsoft Case* seek the interpretation of the scope of this right. They claim that ISPs infringe on this right by facilitating copyright works to be made available for download by users. This decision will be important in interpreting the provisions of section 26 on the exclusive rights attached to music work copyright and the role ISPs in curbing infringement of the right.

Article 6(1) of the WCT asserts the right of distribution by including in its description the right to authorize the making available for distribution. This treaty is not ratified in Kenya but authoritative as an internet treaty. There have been conflicting decisions in other jurisdictions interpreting making available with relation to the right of distribution in the online environment.

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<sup>315</sup> Section 26 and 28 of KCA.

<sup>316</sup> Newman, Joshua W. "Selling the right to license: Examination of the first sale doctrine through the lens of UMG Recordings & Quanta Computer." *J. Corp. L.* 35 (2009): 849.

<sup>317</sup> Ibid.

<sup>318</sup> Dean op cit (n220) at 34.

In *BMG Canada Inc. v John Doe*<sup>319</sup>, the court refused to classify uploading of copyright works in a file sharing system as distribution since the right is not infringed by a mere offer to distribute to members of the public.<sup>320</sup> the holding in the case<sup>321</sup> relied on the analogy used in the *CCH case*:<sup>322</sup> “[there is no] real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service.”<sup>323</sup> In the USA case of *Hotaling v. Church of Jesus Christ of Latter-Day Saints*<sup>324</sup> where the presiding judge instructed the jury on interpretation of infringement of the right of distribution: “making available for electronic distribution on a [P2P] network infringes on the right of distribution even when there is no actual distribution.”

To facilitate the protection of this right by CMOs Kenya needs to provide the scope of this right. Having signed the WCT Kenya should ratify the treaty and amend the provisions in the Copyright Act to expand the scope of the right so as to cover digital uses of music works that facilitate distribution through making the works available on online networks.

#### **3.2.4. Transformative and Derivative works**

This section focuses on transformative and derivative works in the form of User Generated Content (UGC)s. UGCs are content produced by end users of copyright works by using existing works to create protectable works due to the societal shifts in content creation brought by digitization.<sup>325</sup> Technological tools such as blogs, virtual communities, wikis, YouTube, Facebook, Flickr and other social media platforms facilitate this type of creation. Traditionally copyright was a right traded and enforced by professionals leaving out the “amateur user”<sup>326</sup> from the licensing equation. Copyright laws were also designed for massive use as opposed to massive re-use. This is not viable in the digital era since creation is facilitated by using existing works. Therefore laws that hinder this transformative use may be considered as

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<sup>319</sup> 2004 FC 488.

<sup>320</sup> Observations by David Nimmer a distinguished copyright law scholar, author of the most influential treaties on Copyright Law and contributor to the 1978 Report of the National Commission on New Technological Uses of Copyright Works (CONTU).

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Guy op cit (n259) at 40.

<sup>324</sup> 118 F.3d 199, 203 (4th Cir.1997).

<sup>325</sup> Gervais op cit (n122) at 19.

<sup>326</sup> An internet user who has become a content provider without being a professional in the field.

hindering creation thereby defeating the main purpose of creation. These transformative uses also illuminate the need for collective management in the digital environment. This section questions the efficiency of Kenya's laws in distinguishing between an infringing UGC from one that is not. It also proposes that the access to music works for creation of these derivative and transformative works be regulated by CMOs through licensing function.

Copyright prevents copying of an original work but does not hinder independent creation of the same work.<sup>327</sup> It follows that authors may use ideas and concepts in existing works so long as it is not a direct imitation of another's work.<sup>328</sup> Section 22(4) of the Copyright Act provides that work shall not be ineligible for copyright protection for the reason that the making of that work involved an infringement of copyright in some other work. Further sections 22(3)(a) and section 28 of the Act provide the standard of originality for music works based on effort expended to give the work an original character. The originality requirement in this section does not deal with the tension between pre-existing works and derivative works. This presents a confusing interpretation of originality with reference to these types of works. From the reading of the Act users may create copyrightable music works content by making derivative and transformative works. These may be in form of parodies or videos posted on these social media platforms.

The Copyright Act lacks a definition for transformative or derivative uses. Section 2(1) of the Act defines work to include: 'translations, adaptations, new versions, or arrangements of pre-existing works, and anthologies or collections of works which, by reason of the selection and arrangement of their content, present an original character.'<sup>329</sup> From this definition a derivative work is copyrightable by the reason of constituting work in the form of an adaptation as per section 2(1) of the Copyright Act provided it contains some originality.

UGC's may infringe on the exclusive rights of reproduction and adaptation due to their nature.<sup>330</sup> Section 26 and 28 of the Copyright Act forms the basis of a music work copyright infringement claim. There has to be the unauthorized performance of an exclusive right in

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<sup>327</sup> *Rapid Phase Entertainment v SABC* 1997 JOL 393 (W).

<sup>328</sup> Ibid.

<sup>329</sup> Section 2(1) of KCA.

<sup>330</sup> Section 26 of KCA; the case of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) developed the fair dealing exception to create derivative works.

relation to the whole of the music work or “a substantial part either in its original form or in any form recognizably derived from the original.”<sup>331</sup> Therefore a derivative is an infringing work for containing parts of an initial work and is not included in the fair dealing exceptions.

UGCs do not fall in the ambit of fair dealing exceptions and may be interpreted to be infringements.<sup>332</sup> The copyright does not have a definition of derivative works and does not distinguish between an infringing derivative work and a non-infringing by not being included in the fair dealing provisions. In 2006 the UK Gowers Review of Intellectual Property (Gowers Review) for an amendment to the European Union's Copyright Directive of 2001 to deal expressly with "transformative uses."<sup>333</sup>

The Copyright Act should be amended to provide a definition of transformative and derivative works. Thereafter if the legislators choose to leave out these works from the fair dealing exceptions it may be accurately interpreted that they are infringements of copyright whose creation should be stopped by right holders through their respective CMOs. Legislators may also decide to exclude creation of derivative works from infringement. The researcher proposes that this should be done by listing the excluded purposes of derivative works.<sup>334</sup> The creation of these new types of music work repertoire may be managed by CMOs to allow for creation in the digital environment.

### **3.2.5. Public acceptance of the concept of collective management**

The role of CMOs has evolved to encompass the social and cultural purposes such as providing education and public relations activities to the public.<sup>335</sup> These activities are aimed at offering a better understanding of author's rights.

CMOs help online users to see the benefit of paying for use of digital music in order for them to appreciate the cost attached.<sup>336</sup> By enabling the availability of music copyright to users,

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<sup>331</sup> Section 26 of KCA.

<sup>332</sup> Ibid.

<sup>333</sup> Treasury, Her Majesty's S. "Gowers Review of Intellectual Property." (2006).

<sup>334</sup> Wong, Mary WS. "Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use." *Vand. J. Ent. & Tech. L.* 11 (2008): 1075.

<sup>335</sup> Gervais and Maurushatop cit (n26) at 5.

<sup>336</sup> Ibid.

CMOs assist the users to appreciate the value of music copyright through providing an avenue to remunerate right holders for their creativity.

Users who are unable to lawfully use digital copyright works, claim that copyright does not work in the digital age.<sup>337</sup> CMOs should help to alleviate this problem by offering user friendly licensing procedures to make authorized use possible. This protects right holder's rights and encourages users to obtain permission to use the work as opposed to infringing on copyright.<sup>338</sup>

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<sup>337</sup> Gervais op cit (n43) at 7.

<sup>338</sup> CIS project, CISAC's response to challenges of digital technology and the internet; Mihály op cit (n15) at 4.



## Chapter Four

### 4.0. Comparison of Kenya's situation with South Africa and Nigeria

The comparison in this chapter is restricted to proposed and existing legislations in South Africa and Nigeria and how they address the challenges of regulating music works and collective management in the digital environment. The findings are limited since the discussion is not based on the operation of CMOs in each country currently. The researcher does not deal with Kenya separately since collective management in Kenya has been discussed effectively in chapter three.

This chapter discusses the legislative provisions on ISP liability in South Africa and Nigeria, how the countries have dealt with or are proposing to tackle illegal dissemination of music works through file sharing, the interpretation of fair dealing exceptions, definitions of exclusive rights attached to music works and the scope of their application.

#### 4.1. South Africa

South Africa's response to the digital concerns addressed in chapter three is essential when considering the need for Kenya to amend its copyright legislation to address the digital challenges affecting CMOs. South Africa lies in the same position as Kenya concerning the ratification in that both countries have signed but not ratified the WCT. This makes South Africa a perfect benchmark for Kenya in areas where South Africa has addressed the digital concerns of copyright and collective management in their legislation or case law.

South Africa's copyright Act regulates secondary copyright infringement an aspect lacking in Kenya's copyright Act provisions dealing with infringements. It also makes provision for ISP liability of copyright infringements in the ECT Act.<sup>339</sup> Additionally South Africa has decided a matter on online copyright infringement which may be instructive and provide lessons for Kenyan courts and CMOs on how to deal with such matters.<sup>340</sup> The country started the path to amend its copyright legislation after assessing the effectiveness of CMOs. This proves the effect of copyright legislation on the performance of CMOs in the digital environment. The Department of Trade and Industry also drafted a copyright bill<sup>341</sup> as per the recommendations of a commission formed to assess the effectiveness of CMOs

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<sup>339</sup> The ECT Act.

<sup>340</sup> *The Four Corner's case*.

<sup>341</sup> 2015.

in South Africa. This is in line with the position taken in this dissertation that regulation of copyright offers the best way to align CMOs with digital changes and the recommendation to introduce a copyright bill. The copyright bill was amended in 2017 to address fair dealing concerns and the scope of the right to reproduction and communication of works in the digital environment.

This section discusses South Africa's response to the digital challenges faced by CMOs managing copyright by providing legislations that regulate collective management in the country, a brief history on the legislative journey that attempts to amend the existing copyright legislation and the specific provisions that address digital challenges of managing music works as addressed in chapter three.

Collective management in South Africa is mainly regulated by the Copyright Act of 1978, the Performers Protection Act of 1967 and the 2006 Regulations on Establishment of Collecting Societies in the Music Industry. These regulations set out rules for establishment and operation of collecting societies in South Africa.<sup>342</sup>

The Southern African Music Rights Organization (SAMRO)<sup>343</sup>, South African Recording Rights Association Limited (SARRAL)<sup>344</sup> and Dramatic Artistic and Literary Rights Organization (PTY) Ltd (DALRO)<sup>345</sup> were formed before the copyright Act came into operation. Currently there are five registered CMOs in South Africa; SAMRO, South African Music Performance Rights Association (SAMPRA), the Composers Authors and Publishers Association (CAPASSO), National Organization of Reproduction Rights (NORM) and the Performers Organization of South Africa Trust (POSA). SAMPRA and SAMRO collectively manage music works with SAMRO managing performing rights on behalf of composers, publishers and lyricists and SAMPRA managing needle time rights.<sup>346</sup> NORM manages publishers' mechanical rights. In 2014 NORM and SAMRO partnered to set up CAPASSO which now licenses mechanical rights of musical works. POSA was set up to administer needle time rights assigned to SAMRO.

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<sup>342</sup> Section 9A and section 5(3) of the Performers Protection Act

<sup>343</sup> 1961.

<sup>344</sup> 1966.

<sup>345</sup> 1967.

<sup>346</sup> <http://www.samro.org.za/newsletter/content/look-various-collecting-societies-sa-and-roles-they-play-music-industry-0>.

An order by the South Gauteng High Court for the liquidation of SARRAL in 2009<sup>347</sup> was one of the reasons behind the formation of the Copyright Review Commission (CRC) to assess the effectiveness of CMOs in South Africa. The CRC chaired by Justice IG Farlam was formed in 2010 to look into;<sup>348</sup> the distribution of royalties in South Africa and outside the country, the nature and extent of use of music by cell phones in the digital platforms and whether users are paying royalties to the right copyright owners, developing the music industry by promoting local content.<sup>349</sup> The commission found that the copyright legislation was outdated and does not cover some forms of digital exploitation, the growth of the digital music industry was hindered by non compliance by mobile service providers and inefficiency of CMOs was partly caused by lack of compliance to corporate governance standards. CRC recommended an overhaul of the whole copyright system and the need for legislation that addresses matters concerning CMOs. The Copyright Amendment Bill was published in 2015. The Bill was described as described as a “curate’s egg” for being partially good and partially bad.<sup>350</sup> The Bill was revised and introduced to the National Assembly on May 2017. The 2017 Bill<sup>351</sup> seeks to amend provisions in the Copyright Act, 1978 and align it with the digital era.<sup>352</sup> It seeks to allow the reproduction and fair use of copyright; provide for accreditation and registration of CMOs and provide a procedure for the settlement of royalties amongst other reasons listed in the.<sup>353</sup> It also introduces provisions that require CMOs to be registered with the Companies and Intellectual Property Commission.<sup>354</sup> The 2017 Bill seeks to restrict CMOs to collect royalties for registered members only and in respect of one set of copyrights.<sup>355</sup>

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<sup>347</sup> Copyright Review Commission (2011). Copyright Review Commission Report, Department of Trade and Industry, Republic of South Africa, Pretoria. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=173384>.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> Dean, Owen. "DTI dishes up a hopeless curate's egg: intellectual property." *Without Prejudice* 15.8 (2015): 46-49. Available at <http://blogs.sun.ac.za/iplaw/2015/08/05/dti-dishes-up-a-hopeless-curates-egg/>.

<sup>351</sup> [B13-2017].

<sup>352</sup> The Memorandum and Objects of the Copyright Amendment Bill.

<sup>353</sup> Cobus Jooste ‘A Diamond in the Rough – Technology and the Copyright Amendment Act’ 19 August 2015 <http://blogs.sun.ac.za/iplaw/2015/08/19/a-diamond-in-the-rough-technology-and-the-copyright-amendment-act/>.

<sup>354</sup> Chapter 1 A of the Copyright (Amendment) Bill 2017.

<sup>355</sup> Ibid.

The South African copyright Act makes provision for secondary copyright infringement in section 23(2)<sup>356</sup> and 23(3)<sup>357</sup> provided the infringer has knowledge that his actions constitute an infringement.<sup>358</sup> Further section 27 criminalizes copyright infringement. This section has been used to enforce copyright in the realm of file sharing as was witnessed in the *Four Corner's case*. This was the first South African case to deal with file sharing in the digital environment and to sentence a person for copyright infringement. In this case the court imposed individual liability for online file sharing activities. While discussing the enforcement of music works disseminated through file sharing systems, this dissertation submits that imposing ISP liability for the infringing acts of subscribers is the best way for Kenya to deal with online copyright infringement. South Africa creates ISP liability in the ECT Act for providing information system services unless they are protected by the safe harbor protections in Chapter XI of the Act. Service Providers are protected from liability arising from the very nature of their work such as being mere conduits,<sup>359</sup> caching,<sup>360</sup> hosting,<sup>361</sup> providing information location tools<sup>362</sup> provided that they make provision for take down notifications when infringements are reported<sup>363</sup>.

The Copyright Amendment Bill attempts to harmonize fair dealing and fair use concepts despite South Africa being a fair dealing state by introducing clause 10 (1) (a). This provision seeks to broaden the scope of exemptions in section 12 of South Africa's Copyright Act by allowing use of protected works for scholarship, research, teaching, format shifting for lawfully possessed works, access for underserved populations and for performance of public administration.<sup>364</sup> This approach may not be implemented in Kenya since Kenya adopts the fair dealing approach and lacks the limitations sought to be introduced by the Bill.<sup>365</sup> In determining fairness for purposes of fair use the Bill proposes considering: the nature, the amount and substantiality, purpose, the effect of the work in the market.

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<sup>356</sup> Where a person unauthorizedly deals with protected work.

<sup>357</sup> Allows a place to be used for the public performance of infringing works.

<sup>358</sup> Section 23(2) of the South Africa's Copyright Act.

<sup>359</sup> Section 73 of ECTA.

<sup>360</sup> Section 74 of ECTA.

<sup>361</sup> Section 75 of ECTA.

<sup>362</sup> Section 76 of ECTA.

<sup>363</sup> Section 77 of ECTA.

<sup>364</sup> Clause 12A(1), (2), (3) of the Copyright Amendment Bill 2017.

<sup>365</sup> Section 26 of KCA.

Clause 13 A of the Copyright Amendment Bill 2017 seeks to allow reproductions for the making of transient copies to facilitate the transmission of work and use on different technological devices for lawful use provided there is no independent economic gain. In this way the section explains the scope of the right of reproduction. This provision is lacking in the Kenya Copyright Act which defines a reproduction to include temporary reproductions.

Clause 25 seeks to amend section 27 of the current Copyright Act by criminalizing the circumvention of anti-circumvention tools such as TPMs. For this matter, it effectively regulates digital protection of copyright by restricting the circumvention of TPMs. This amendment is in line with section 86 of the ECT Act which also criminalizes anti circumvention of technological protection tools.

Clauses 4 and 7 of the Bill provide for the right of communication of work to the public in relation to music works. This communication may be by wire or wireless form or through internet provided that members of the public can have access to the work. This right is present in the Kenya Copyright Act but does not encompass the making available right in the definition of the right

In terms of distribution of copyright works, the Bill seeks to allow parallel importation of works where the rights were exhausted nationally or internationally when the original or copy of a work was sold or where ownership was transferred.<sup>366</sup>

The researcher recommends the adoption of SA's technique of proposing amendments to their copyright Act to solve CMO problems of managing copyright in the online environment in Kenya. This will play an important role in enhancing the effectiveness of CMOs in Kenya and modernizing the Copyright Act in order to address digital challenges of managing copyright through CMOs. Adoption of a system similar to South Africa's system on ISP liability will solve the problem of lack of legislation and facilitate authorized use of music works by involving ISPs in the enforcement of music work copyright. An exception to the right of reproduction for making transient copies like the one proposed in South Africa's copyright Bill will assist in alleviating Kenya's challenge of determining the scope of the right of reproduction. The scope of the right of communication in Kenya may be defined by including the

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<sup>366</sup> Clause 13A of the Copyright Amendment Bill.

making available right in the description of the right. However, the harmonization of fair use and fair dealing provisions to define fairness is not commendable for Kenya which is a fair dealing state. Another shortcoming of relying on South Africa's approach lies in the lack of proposed or existing legislation to legitimize file sharing as one of the uses of copyright that CMOs should manage.

## **4.2. Nigeria**

Nigeria's position concerning the digital concerns addressed in chapter three is relevant in solving the challenges of operation of CMOs in Kenya. Nigeria just like Kenya has two CMOs<sup>367</sup> representing musicians.<sup>368</sup> Secondly, it ratified the internet treaties which are considered to be instrumental in alleviating the challenges facing CMOs in the digital environment.<sup>369</sup> Thirdly, the country has acknowledged the need to amend its Copyright Act and align it with changes in the digital environment so as to ensure compliance with international instruments.<sup>370</sup> The process started in 2006 and by 2015 Nigeria had a Draft Copyright Bill which proposes the amendment of Nigeria's Copyright Act to include wider fair dealing exceptions and a test for fairness criteria to be considered when applying these exceptions.

This section discusses Nigeria's response by providing legislations that regulate collective management in the country, a brief history on the legislative journey that attempts to amend the existing copyright legislation to be in line with digital challenges and the specific provisions that address the digital challenges faced by CMOs managing music works as discussed in chapter three.

The 1992 amendment to the Copyright Act of 1970 brought regulation of CMOs in Nigeria. This is replicated in section 39 of Nigeria's current Copyright Act which provides for the formation of CMOs in Nigeria.<sup>371</sup>

The Performing Rights Society (PRS) licensed Giwa and Atilade Co. as its agent making it the first organization to be responsible for collective management of

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<sup>367</sup> MCSN and COSON.

<sup>368</sup> MCSK and MPAKE.

<sup>369</sup> In October 2017.

<sup>370</sup> Draft Copyright Bill 2015.

<sup>371</sup> 1988.

copyright in Nigeria.<sup>372</sup> The PRS agency was tasked with getting composers to join the society and users to pay for licenses to use composers' works.<sup>373</sup> In 1984 the Musical Copyright Society of Nigeria (MCSN) to administer the public performance right of musicians in Nigeria making it the first fully fledged CMO in Nigeria.<sup>374</sup> MCSN signed a contract of reciprocal representation with PRS. The Nigerian Copyright Commission (NCC) did not approve MCSN claiming that its structural did not represent a nationalistic interest.<sup>375</sup> Later in 1993 the NCC registered the Performing and Mechanical Rights Society of Nigeria (PMRS). PMRS had no infrastructure and foreign cooperation. It licensed locally but struggled to license international repertoire. This made MCSN the de facto collecting society despite not being approved to function as a CMO in Nigeria.

In 2005 the Nigerian Commission approved MCSN to operate as a CMO for the music industry. PMRS protested this move and made a representation to the government for the withdrawal of the approval. This laid the ground for the reform of collective management in Nigeria. The reform brought about the Copyright (collective management organization) Regulation 2007 which called for applications from interested organizations to operate as CMOs. Thereafter Copyright Society of Nigeria (COSON) was formed.

In September 1999 WIPO in conjunction with the Nigerian government organized a workshop on teaching intellectual property in the region. At the opening the Federal government announced its intention to restructure its I.P administration. It set up the I.P Commission which was tasked with the responsibility of creating an I.P agency and making recommendations for the review of IP laws. The commission made a policy that did not go beyond that.

In 2006 the Intellectual Property Commission Bill (NIPCOM Bill) built on the previous I.P Bill. The NIPCOM bill proposed changes that would complement the Federal Government's agenda. In 2007 the Bill was made to cover all subject matter of intellectual property but did not see the light of day. Another attempt on the amendment of the

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<sup>372</sup> Okoroji, Tony. "Copyright, Neighbouring Rights & the New Millionaires: The Twists and Turns in Nigeria." (2009).

<sup>373</sup> Rotimi op cit (n17) at 4.

<sup>374</sup> Ibid.

<sup>375</sup> This was due to the dominant position that the PRS and the Mechanical Copyright Protection Society (MCPS) had in MCSN.

Copyright Act was when the Copyright Law Reform group drafted the Copyright (Amendment) Bill in 2010. This Bill was meant to reflect changes in the technological and digital sphere but was not passed into law. On 6<sup>th</sup> December 2012, the Director General of the NCC announced that he had set in motion the Copyright System Reform which aimed to put copyright law in line with international obligations.

The Nigerian Draft Copyright Bill 2015 was drafted to strengthen copyright in the digital environment and for compliance with international copyright treaties. An interesting provision in the 2015 Bill is section 74(10) which states that a CMO may issue licenses permitting the use of works of owners of copyright who are not members of the CMO under several circumstances namely:

- a. such works are of the same category as works for which it is approved to issue licenses;
- b. the owners of copyright in such works are not otherwise represented by any other CMO;
- c. the owners of copyright in such works have not specifically opted out of collective management of their rights and
- d. the CMO does not discriminate against such owners in terms of the tariffs for the use of their works and the royalties paid to such owners.

This provision creates a significant incentive for a person or groups of persons to register with the NCC as a CMO; however if abused by CMOs and may cause detriment to copyright holders, users and members of the public.

Section 15(1) of the Nigerian Copyright Act may be interpreted as providing for intermediary liability. It states that, copyright is infringed by causing another person to perform an exclusive right accorded to a copyright holder or exhibit an infringing work with knowledge that such actions are infringing.<sup>376</sup> This provision is identical to section 35 of the Kenya Copyright Act. Nigeria and Kenya have no explicit mention of intermediary liability for infringement in their Copyright Acts. However, the two countries differ in their proposed amendments since Kenya proposed amendments to the Copyright Act seek to provide for intermediary liability and safe harbors in the Copyright Act but these provisions are not present

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<sup>376</sup> Section 15(1)(a) as read with section 15(1)(c) of the Nigerian Copyright Act.



in Nigeria's Draft Copyright Bill. The Draft Bill seeks to introduce criminal liability for principal infringers of copyright similar to South Africa<sup>377</sup> and it proposes the addition of a crime for aiding commission of copyright offences.<sup>378</sup>

The fair dealing exceptions are provided in section 20 of the Draft Bill for purposes of parody, satire, pastiche or caricature, research, teaching, education, private use, criticism, review or the reporting of current events, provided if the use is public it is accompanied by an acknowledgment of the title of the work and its author except for works included in broadcasts. This section is more detailed than the fair dealing provisions in section 26 of the Kenya Copyright Act since it provides a limitation to exclusive copyrights for purposes of teaching, education, parody, satire, pastiche or caricature. Nigeria's Draft Bill also acknowledges that fair dealing with works may be in form of public use and requires acknowledgment of the author and the title of the work for such use to be considered fair. Additionally, it proposes a test for fairness which is lacking in the Kenya Copyright Act. The Draft Bill proposes considering: the purpose, nature, amount and substantiality of the work, effect of the use on the value of the work and whether the use conflicts with normal exploitation of the work and does not unreasonably prejudice the interests of a copyright owner.<sup>379</sup>

In terms of defining the scope of the right of reproduction the Draft proposes an exception to cater for temporary acts of reproduction that are essential for technological use or a lawful purpose.<sup>380</sup> The draft seeks to set the acceptable number of copies to be allowed for fair dealing purposes at three or a number to be directed by a person in charge of a library, provided that such work is not available for sale in Nigeria. This differs from the Kenya Copyright Act which allows the making of a single copy in its private copying exception.<sup>381</sup>

The Bill proposes the introduction of exceptions to allow for the circumvention of TPMs in sections 44 and 45. This position differs from Kenya where the circumvention of TPMs is considered unlawful and has no exceptions. This Bill makes provision

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<sup>377</sup> Section 27 of the South Africa Copyright Act.

<sup>378</sup> Section 38 of the Draft Copyright Bill.

<sup>379</sup> Clause 20(1)(a) of the Draft Copyright Bill.

<sup>380</sup> Section 20 n of the Draft Copyright Bill.

<sup>381</sup> Section 28 of KCA.

for the right to communicate work to the public and assigns a right of remuneration to this right.<sup>382</sup> It describes this right as encompassing actions relating to making the work available.<sup>383</sup> Further, it provides an exception to this right in section 20 for research, use in libraries, educational establishments, museums and archives and other subject matter that is not subject to purchase or licensing.<sup>384</sup> The Kenya Copyright Act does not refer to the making available right when defining the right of communication to the public for this reason it does not describe the scope of the right in the digital environment.<sup>385</sup>

Kenya should follow Nigeria's example and acknowledge the need to align copyright laws with changes brought by digitization. Nigeria has ratified the internet treaties and this is predicted to hasten the process of amending its copyright laws. Nigeria's Draft Bill proposes inclusion of a fairness test and wider fair dealing exceptions like exception to create temporary reproductions and provides the scope of the exception by specifying that the exception would only be applicable if essential for a technological and lawful purpose. Its proposal to include the making available right in the description of the right of communication to the public is welcome for Kenya. However, Nigeria lacks a cogent solution for solving the challenge of regulating ISP liability, explaining the scope of the right of distribution and allowing for the creation of transformative and derivative works.

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<sup>382</sup> Section 14 of the Draft Copyright Bill.

<sup>383</sup> Section 85(1) of the Draft Copyright Bill.

<sup>384</sup> Section 20(t) of the Draft Copyright Bill.

<sup>385</sup> Section 2(1) of the KCA.

## Chapter Five

### 5.0. Conclusion and Recommendations

#### 5.1. Conclusion

Digital technologies do not phase out CMOs they create a need for laws to address the specific challenges brought about by digital exploitation of music works. Kenya has undergone a technological wave of change due to wide use of mobile phones and accessibility to the internet and this has affected copyright law and management of copyright. Although the law has changed severally since 1966 when Kenya enacted the Copyright Act after independence, the current provisions are not adequate for the management of copyright in the digital era. There is a dire need to enact provisions that enable management of music works through CMOs in the digital environment.

The fair dealing provisions in section 26 of the Copyright Act are important in defining the scope of music work rights to be managed by CMOs. They may be applied in the online environment but the scope of their application is blurred by digital uses of music works. Section 26 of the Copyright Act should be expanded to regulate and allow for fair digital uses of copyright. The Copyright Act requires to define the term '*fairness*' or provide a test for fairness so as to qualify limitation of exclusive rights which in turn hinder collective management of the digital uses of music works.

P2P file sharing expands the role of CMOs as it offers an opportunity for the management of music rights distributed through these systems. With online file sharing is the need to legislate on intermediary liability, to assist in enforcing copyright holders' rights of distribution, communication to the public and reproduction in the digital sphere. Kenya should embrace file sharing as a new means of disseminating digital music works and provide a definition to distinguish commercial and private uses in the online context. This will assist CMOs in defining the scope of their mandate and embrace their role in legitimizing noncommercial file sharing for the benefit of right holders.

Since reproductions have become necessary for the creation of music works in the digital space, it is important for Kenya to differentiate between infringing reproductions and reproductions that are necessary for creation and dissemination of music works. Kenya should do

so by expanding its fair dealing provisions to include the making of transient copies so as to facilitate creation and collective management in the digital environment. Additionally, CMOs should utilize TPMs to enhance their management of music works in the online environment.

The right of communication to the public and distribution in the online environment are highly dependable on the interpretation of the making available right in relation to the rights. This has been adequately interpreted in the WCT which Kenya is a signatory of but is not applicable in Kenya since it is not ratified.<sup>386</sup>

The internet facilitates creation by using existing works leading an increase to UGCs and transformative works. The definition of transformative works and its inclusion or exclusion in the fair dealing provisions plays a big role in the determination of collective management of works used in the creation of these transformative works.

CMOs have a role to play in creating the acceptance of copyright and collective management in the minds of online users. Past experiences in Kenya with CMOs such as MCSK indicate a need for behavioral modification of users for efficient collective management. CMOs present a system of less freedom to use music in the digital sphere as compared to unpaid access. Users of music in internet need to be educated on the importance of copyright so as to create public acceptance of the need to get authorization for use of protected works. It follows that CMOs have to ensure that authorized music should be as user-friendly as free music.

Nigeria and South Africa have proposed robust legislative provisions on the regulation of copyright that directly affects CMOs.<sup>387</sup> It is not to say that Kenya should copy their laws, but future amendments to the Copyright Act should address some of the challenges by incorporating provisions to enhance collective management of music works in the digital environment. This dissertation will address these provisions by recommending their application so as to amend the Copyright Act.

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<sup>386</sup> Article 2(6) of the Constitution of Kenya.

<sup>387</sup> Nzomo op cit (n111) at 18.

## 5.2. Recommendations

This dissertation proposes the following recommendations for Kenya and countries facing the same legislative challenges in management of music works in the digital environment:

Firstly, Kenya needs to embrace the fact that digitization of music works does not phase out CMOs but requires laws enabling the management of copyright by initializing the process to amendment of copyright legislation. The Copyright Act should be amended to define fairness and with regard to the fair dealing exceptions addressed in section 26. Kenya should adopt the test for fairness used in the *CCK case* as drawn from the Canadian holding in the *CCH case*. This test is used in South Africa's Bill and Nigeria's Draft Copyright Bill. The fair dealing exceptions should also be explained with reference to digital uses in order to define the scope of exclusive rights. This may be done by expansion to allow for temporary reproductions as proposed in legislations in South Africa and Nigeria. This dissertation recommends adoption of the exception for making temporary reproductions in the same manner as provided in Nigeria's Draft Bill which clearly provides that the exception is for a technological or lawful use.<sup>388</sup> The fair dealing provisions in the Copyright Act should distinguish between private and commercial use of copyright in the digital sphere.

Secondly, the Copyright Act should regulate P2P file sharing in Kenya. This should be done by recognizing CMOs as enforcement agencies that work hand in hand with KECOBO and copyright inspectors. Additionally, the Copyright Act should provide laws imposing intermediary liability for copyright infringement. The petition in *Bernsoft*<sup>389</sup> *Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors* should be decided to give an indication on Kenya's position on intermediary liability. KECOBO has indicated its position on this liability by drafting proposed amendments to the Copyright Act for this liability and should hasten the process for them to be introduced in parliament. The proposed amendments are identical to the provisions in South Africa's ECT Act. For these reasons the dissertation recommends that if the proposed amendments to the Copyright Act fail, Kenya may consider providing the same provisions by introducing legislation that deals with electronic communications and transactions.

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<sup>388</sup> Mihály op cit (n15) at 4.

<sup>389</sup> Ibid.

Another recommendation is to allow licensing of the use of music works between CMOs and P2P users through a regulatory provision in the copyright Act.

Thirdly, Kenya should ratify the WCT as a way of incorporating and defining the scope of exclusive rights by attached to music works in the digital environment. If Kenya chooses not to ratify these treaties, the country should amend the Copyright Act to include the making available right in the right of communication to the public and the right of distribution as is proposed in South Africa<sup>390</sup> and Nigeria<sup>391</sup>.

Fourthly, the Copyright Act should embrace the idea of mass re-use of copyright as presented by transformative or derivative uses and differentiate between infringing derivative works from lawful works. To this effect, the Act should define the terms “*transformative or derivative*” and “*User Generated Content*”. This will define whether these uses qualify to be classified as fair dealing and when use of copyright works may be licensed by CMOs.

Fifthly, MCSK should set aside adequate finances for the education of music work users. This education should be aimed at creating public acceptance of the importance of music copyright and rewarding the respective right holders.

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<sup>390</sup> Copyright Amendment Bill.

<sup>391</sup> Draft Copyright Bill.

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